Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

EMILY DISTAJO, RENATO DISTAJO, CONSTANTINO LAMANDO, MILO LAMANDO, JOSE ALBERTO BRENES, ALVARO GUERRERO, MARIA GUERRERO, WESAM YOUMARAN, LINDA YOUMARAN, LOUIS LOENNECKE, MARY ANN BOOKOUT, MICHAEL JOHNSON, RONALD ROTHMUND, PATRICIA ROTHMUND, JOHN PAPALEO, J.S.P., INC., RAYMOND BICKEL, SANDRA BICKEL, MUSHTAG KANCHWALA, ANVER KANCHWALA AND AZIM HEMANI.
Petitioners,

vs.

DOCTOR'S ASSOCIATES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the abstention doctrine bars a federal court from enjoining further prosecution of a state case in which a judgment for $400,000.00 has been entered, an appeal bond posted and appeal filed, while ordering arbitration of the same claim previously determined by the state judgment?

II. Whether the Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal courts to relitigate state judgments holding the arbitration clauses void and unenforceable and awarding $400,000.00 in damages if the federal actions were filed before the state judgments were entered?

III. Whether the Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal courts to relitigate the issues and claims previously determined by the North Carolina state court which refused to enforce the arbitration clause, if the Connecticut federal action was filed after the state rulings and raised issues inextricably intertwined with the state rulings: i.e., the validity and enforceability of the arbitration clause?

LIST OF PARTIES

In addition to the parties named in the caption of the case, Gregory Kane, Deborah Kane, Bruno Giannini, Julie Shino, Johnson Shino, Albert Yonan and Lelyah Yonan were also parties to the proceedings in the court whose judgment is sought to be reviewed here. They are not petitioners. There are no other parties to the proceedings in the court whose judgment is sought to be reviewed here. There is no parent or subsidiary company of any party to be listed.

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No.

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PETITION FOR A WRIT OF CERTIORARI

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Hemani respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 107 F.3d 126 (2nd Cir. 1997) and is reproduced in the Appendix at pp. 1a through 30a. The District Court opinions are reported. See Doctor's Associates, Inc. v. Distajo et al., 944 F. Supp. 1007 (D. Conn. 1996) and Doctor's Associates, Inc. v. Distajo, 944 F. Supp. 1010 (D. Conn. 1996). These decisions are also reproduced in the Appendix at 63a, 71a and 76a . The opinions below were issued following remand after a previous appeal. See Doctor's Associates, Inc. v. Distajo, et al., 870 F. Supp. 34 (D. Conn. 1994), partially affirmed and partially reversed and remanded, Doctor's Associates, Inc. v. Distajo, et al., 66 F. 3d 438 (2nd Cir. 1995), cert. denied ___ U.S. ___, 116 S.Ct. 1352, 134 L.Ed. 2d 520 (1996).

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on February 24, 1997. The petition for rehearing was denied on April 24, 1997. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §2283

§2283. STAY OF STATE COURT PROCEEDINGS

A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

All petitioners except Michael Johnson are franchisees of Doctor's Associates, Inc. ("DAI") who operated Subway Sandwich franchise stores in Illinois. With the exception of Louis Loenneke and Mary Ann Bookout, who reside in Wisconsin, they are all Illinois citizens and residents. All petitioners except Michael Johnson will hereafter be referred to as the Illinois franchisees.

Michael Johnson is a citizen and resident of North Carolina who operated a Subway Sandwich franchise store in Gastonia, North Carolina.

In late 1993 and early 1994, most of the Illinois franchisees filed suit against DAI and others in Madison County Illinois claiming violations of the Illinois Franchise Disclosure Act, the Illinois

Consumer Fraud Act, Common Law Fraud and Breach of Contract, among other claims.

The first four sets of Illinois franchisees filed their state complaints during December, 1993. On January 20, 1994, DAI removed the first four cases to the United States District Court for Southern Illinois, which remanded all four cases on March 24, 1994. Under federal common law according to the Seventh Circuit, which sits in Illinois, DAI waived its right to compel arbitration by first removing those cases to the federal district court before attempting to compel arbitration. Cabinetree of Wis., v. Kraftmaid Cabinetry, Inc., 50 F. 3d 388 (7th Cir. 1995).

Three of the other five Illinois cases were filed from March through August, 1994. From about March 31 through August, 1994 DAI filed petitions in the Connecticut federal court to compel arbitration against the Illinois franchisees in the first seven Illinois cases.

On March 30, 1994 DAI filed motions to stay pending arbitration in the Illinois state cases. DAI subsequently withdrew those motions. DAI then filed state court motions to dismiss or transfer, alleging lack of venue. Those motions were denied in the Illinois state court prior to July 29, 1994. DAI also filed motions in the state court to transfer to Cook County, Illinois on the grounds of forum non conveniens. Those motions were heard and denied on July 29, 1994. DAI appealed those decisions to the Court of Appeals, where they are now pending.

On October 24, 1994 the Illinois state court entered judgment holding the arbitration clauses in the first seven Illinois cases void and unenforceable on the grounds of waiver, unconscionability, failure to meet the reasonable expectations of the parties under Restatement of Contracts, Second, §211 and lack of mutuality. App. 45a. Thereafter the Connecticut federal court issued contrary orders compelling the Illinois franchisees to arbitrate their claims against DAI in Connecticut and enjoining further prosecution of the state actions.

The 8th group of Illinois franchisees, the Bickels, filed their state court complaint against DAI et al. during late December, 1994 or early January, 1995. DAI obtained a "filed" copy of the complaint and attached it to a petition to compel arbitration filed in the United States District Court for Connecticut (more than ten days before its answer was due in Illinois) where it also sought an injunction against the Bickels' state action. However, DAI failed to timely enter its appearance in the state action, and on February 7, 1995 a default judgment was entered against it in the state case on the issue of liability, scheduling a damage hearing for April 4, 1995. The court also granted a default judgment on the declaratory judgment count holding the arbitration clause void and unenforceable. App. 51a. Thereafter the Connecticut District Court enjoined further prosecution of the Bickels' state action, but permitted DAI and a fellow state defendant to file a motion there to set aside the default judgment.

The 9th group of Illinois franchisees, the Kanchwalas, including Azim Hemani, filed a complaint in the Illinois state court during the summer of 1995. Shortly thereafter DAI filed a petition to compel arbitration against them in the Connecticut federal court. On October 13, 1995 the Illinois state court entered a judgment in favor of the Kanchwalas holding the arbitration clause void and unenforceable. App. 57a. Thereafter the Connecticut federal court enjoined the Kanchwalas from further prosecution of their state action and entered a judgment compelling them to arbitrate their claims against DAI in Connecticut. App. 76a.

On April 8, 1993 Michael Johnson filed an action in the North Carolina state court against DAI and others claiming fraud, breach of contract and related claims. DAI entered its appearance and moved to stay that action pending arbitration and also moved to dismiss claiming that Michael Johnson failed to meet a condition precedent to litigation by failing to first arbitrate his claim against DAI in Connecticut. Those motions were briefed, argued and decided by the North Carolina state court in orders issued on May 3 and May 17, 1994, in which the state court denied DAI's motions to dismiss and to stay. The following day DAI filed a petition to compel arbitration against Michael Johnson in the federal court in Connecticut, App. 42a, and about one week later filed an appeal of the state decisions to the North Carolina Court of Appeals. App. 43a.

Thereafter the Connecticut federal court disregarded the previous state judgments and orders in Illinois and North Carolina and entered judgment compelling all petitioners to arbitrate their claims against DAI in Connecticut, while enjoining petitioners from further prosecution of their state actions in Illinois and North Carolina. The franchisees appealed.

On September 12, 1995 the Second Circuit issued an opinion partially affirming, partially reversing and remanding the cases of all petitioners (except the Kanchwalas who were not party to the first appeal) to the district court. The judgment compelling arbitration and the injunctions against the state actions were reversed and the case remanded with directions to reconsider some of the issues concerning the enforceability and validity of the arbitration clauses. Doctor's Associates, Inc. v. Distajo, et al., 66 F. 3d 438 (2nd Cir. 1995).

The Second Circuit rejected the full faith and credit argument of the Illinois franchisees, 66 F. 3d 438, 449-50, on the grounds that Ballweg v. City of Springfield, 114 Ill. 2d 107, 102 Ill. Dec. 360, 499 N.E. 2d 1373 (1986) permitted a losing party to file a second action and relitigate the same claim against the same opposing party while appealing the adverse decision in the first case. The Seventh Circuit, which sits in Illinois, has previously refused to interpret the Ballweg case and Illinois law in that fashion. Rogers v. Desiderio, 58 F. 3d 299, 301-302 (7th Cir. 1995), Prymer v. Ogden, 29 F. 3d 1208, 1213

n. 2 (7th Cir. 1994). The Second Circuit refused to apply the full faith and credit statute to the North Carolina rulings in favor of Michael Johnson on the ground that the basis for the North Carolina state orders was unclear and therefore not entitled to preclusive effect under North Carolina law. 66 F. 3d 438 at 450-51.

After remand, the Connecticut federal court issued a temporary restraining order on December 5, 1995 to prevent the state courts from proceeding while the Connecticut federal court considered the petitions to compel arbitration, followed by a preliminary injunction on January 3, 1996, App. 63a, Doctor's Associates, Inc. v. Distajo et al., 944 F. Supp. 1007, 1009 (D. Conn. 1996). The district court held that the preliminary injunction against the state actions, while the federal court considered the petitions to compel arbitration, was necessary in aid of the federal court's jurisdiction, as one of the exceptions to the anti-injunction act, 28 U.S.C. §2283, to prevent the state courts from interfering with the federal action. The state and federal courts had concurrent jurisdiction at that time.

The state courts had previously entered judgments holding the arbitration clauses void and unenforceable and DAI had appealed those judgments to the Illinois Court of Appeals. Five appeals filed by DAI to the Illinois Court of Appeals are currently stayed because of the Connecticut federal court injunctions against the state actions and another appeal by DAI to the North Carolina

Court of Appeals is currently stayed for the same reason.

The January 3, 1996 Connecticut federal court injunction violated the anti-injunction act, 28 U.S.C. §2283, and the rationale of the district court is in direct conflict with Chick Kam Choo v. Exxon Corp.,486 U.S. 140, 108 S. Ct. 1684, 1689, 100 L.Ed. 2d 234 (1988), Amalgamated Clothing Workers v. Richman Brothers, 348 U.S. 511, 75 S. Ct. 452, 456-57, 99 L. Ed. 600 (1955), Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S. Ct. 1739, 26 L.Ed. 2d 234, 246 (1970) and Vendo v. Lektro-Vend Corp., 433 U.S. 523, 53 L.Ed. 2d 1009, 1023-24, 97 S. Ct. 2881 (1977), which holds:

> "No case of this court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception *** ".

The Second Circuit dismissed as moot the franchisees' appeal from the January 3, 1996 preliminary injunction because the Connecticut federal court entered judgment compelling arbitration on March 14, 1996 and another injunction to effectuate the March 14, 1996 judgment. App. 31a, 76a.

The petitioners and other Subway franchisees have filed three separate petitions for writs of certiorari arising from two Second Circuit cases argued in tandem, resulting in an opinion in one and dismissal of the other on February 24, 1997

and a subsequent summary opinion issued on June 10, 1997 based, in large part, on the February 24, 1997 opinion. The questions presented by these three separate petitions for writs of certiorari are set forth in the appendix. App. 96a-97a.

While the three petitions for writs of certiorari arise from three cases which are somewhat related, the questions presented in each petition are separate and distinct.

The initial preliminary injunction against the Bickel state action permitted DAI et al. to litigate motions in the state court to set aside the default judgment of February 7, 1995. Those motions were briefed and argued on April 4, 1995, and were under submission to the state court when the injunction was reversed on September 12, 1995. Doctor's Associates, Inc. v. Distajo, et al. 66 F. 3d 438 (2nd Cir. 1995).

On December 6, 1995 the Illinois state court denied the motion of DAI to set aside the default judgment and entered judgment for $400,000.00 in actual damages in favor of the Bickels and against DAI. App. 54a. This was one day after the temporary restraining order issued by the Connecticut district court on December 5, 1995. App. 61a. While the Second Circuit felt it was significant that the Bickels did not notify the state court of the December 5, 1995 temporary restraining order, there was no hearing in the state court on December 6. The state court merely ruled on motions already before it. The various temporary

restraining orders and injunctions issued by the Connecticut federal court were issued against the parties, not the state courts. The courts therefore were not bound by those injunctive orders. Milltex Industries Corp. v. Jacquard Lace Co. Ltd., 922 F. 2d 164, 167 (2nd Cir. 1991).

The state actions have been under injunction almost continuously since November, 1994.

On March 14, 1996 the Connecticut federal court entered judgment compelling all franchisees to arbitrate their claims against DAI in Connecticut and enjoined the state actions to effectuate that judgment. Injunctions to effectuate a federal judgment fall within one of the three narrow exceptions to the anti-injunction act, 28 U.S.C. §2283.

The franchisees appealed again. On February 24, 1997 the Second Circuit issued its opinion and judgment affirming the Connecticut district court judgment compelling arbitration and the March 14, 1996 injunction to effectuate that judgment. App. 1a-30a.

The Second Circuit dismissed as moot the appeal from the prior, January 3, 1996 preliminary injunction which enjoined the state actions while the federal court determined whether to compel arbitration. App. 31a.

REASONS FOR GRANTING THE WRIT

I. The Petition should be granted to confirm that a federal district court abuses its discretion under the abstention doctrine by enjoining further proceedings in a state court in which a judgment for $400,000.00 has been entered, an appeal bond posted and appeal filed, while ordering arbitration of the same claim determined by the state judgment, because of the national importance of this issue and the effect of the opinion below on the principles of federalism.

On December 6, 1995 the Illinois state court denied the motion of DAI to set aside the February 7, 1995 default judgment against it and entered judgment for Raymond and Sandra Bickel for actual damages in the amount of $400,000.00. App. 54a. The order and judgment was entered on the basis of the previously submitted motion of DAI to set aside the default judgment. No hearing occurred on December 6, 1995. The state court was not aware of the temporary restraining order issued at the close of the previous day, December 5, 1995, which was issued in violation of 28 U.S.C. §2283, and which was binding on only the parties, not the state courts.

DAI posted an appeal bond and appealed the $400,000.00 judgment to the Illinois Court of Appeals. All these matters were brought to the attention of the Connecticut federal court.

More than three months after the $400,000.00 judgment was entered against DAI, the Connecticut federal court ordered the Bickels to arbitrate the claim on which the $400,000.00 judgment had previously been entered in their favor and enjoined the Bickels from further prosecution of the state case in which the judgment was entered. App. 71a, 76a.

The Bickels argued that the Connecticut federal court should abstain from hearing the petition to compel them to arbitrate the claim on which they already had a state judgment. DAI responded that the $400,000.00 judgment was interlocutory in nature, that the federal court injunction would keep it in that status while DAI obtained an order compelling arbitration (which was issued on March 14, 1996), followed by an arbitration award and a judgment in the Connecticut district court confirming the arbitration award which would then "take precedence over the Illinois trial court's non-final and non-binding judgment."

The Connecticut federal court concluded that abstention was not required because relatively substantial proceedings had not taken place in the state court. Doctor's Associates, Inc. v. Distajo, 944 F. Supp. 1010, 1022-23 (D. Conn.), App. 93a-94a. The Second Circuit affirmed, holding the Connecticut district court did not abuse its discretion. Doctor's Associates, Inc.v. Distajo et al., 107 F. 3d 126, 138 (2d Cir. 1997). App. 29a-30a.

DAI's state appeal from the $400,000.00 judgment is currently stayed, at DAI's request, because of the Connecticut federal court injunctions. Both the Connecticut district court and the Second Circuit Court of Appeals held that substantial proceedings had not occurred in the state court. The Bickels respectfully submit that a judgment for $400,000.00 followed by an appeal bond and an appeal constitute substantial proceedings in the state court mandating abstention by the federal courts in actions filed to obtain a contrary result and seeking to enjoin further prosecution of the state action.

The Federal Arbitration Act, 9 U.S.C. §1 et seq. has not pre-empted the principles of federalism.

See Younger v. Harris, 401 U.S. 37 (1971) and Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10, 95 L.Ed. 2d 1, 107 S.Ct. 1519 (1987) which held:

"Both the district court and the court of appeals failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system. Similarly, neither of those courts applied the appropriate standard in determining whether adequate relief was available in the Texas court."

The abstention doctrine has no meaning if a federal court can enjoin a state court proceeding in which a judgment for $400,000.00 has been issued, an appeal bond posted and state appeal filed, while

compelling the parties to arbitrate the claim on which the state judgment was entered.

The petition should be granted because of the significant impact of the decisions below on the principles of federalism.

II. The Petition should be granted to confirm that the Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal courts to relitigate issues and claims determined by prior state judgments holding the arbitration clauses void and unenforceable and awarding $400,000.00 in damages, where the federal actions were filed before the state judgments were entered, because of the national importance of this issue and the effect of the opinion below upon the principles of federalism.

On October 24, 1994 the Illinois state court entered judgment holding the arbitration clauses void and unenforceable for multiple reasons in cases involving the first seven sets of Illinois franchisees. App. 45a. DAI had already filed Connecticut federal court petitions to compel arbitration against these Illinois franchisees.

On May 3 and May 17, 1994 the North Carolina state court denied the motions of DAI to dismiss and to stay based upon the arbitration clause. The following day, May 18, 1994, DAI filed its petition to compel arbitration against Michael Johnson in the federal court in Connecticut.

On February 7, 1995 the Illinois state court entered default judgment holding the arbitration clause void and unenforceable in a state action filed by the Bickels. On December 6, 1995 the state court entered judgment for $400,000.00 in favor of the Bickels. The Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal courts to enter rulings which, in effect, set aside a prior state court judgment or to determine issues inextricably intertwined with issues determined in a prior state judgment, even if the state judgment is not final for purposes of preclusion. Since the Rooker-Feldman Doctrine determines subject matter jurisdiction, it may be raised at any time in the proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 68 L.Ed. 362, 44 S. Ct. 149 (1923), Dist. Col. Court of Appeals v. Feldman, 460 U.S. 462, 486, 75 L.Ed. 2d 206, 103 S.Ct. 1303 (1983), Moccio v. New York State Office of Court Administration, 95 F. 3d 195, 198-99 (2nd Cir. 1996) and Gash Assocs. v. Village of Rosemont Illinois, 995 F. 2d 726, 728 (7th Cir. 1993).

The Court of Appeals held that the Rooker-Feldman Doctrine did not apply to deny the Connecticut federal court subject matter jurisdiction to enter judgment contrary to the prior state court judgments because:

(1) it could not say that DAI was attempting to appeal from any of the state decisions to the federal court;
(2) DAI filed its federal court petitions before the state court judgments were entered and;

(3) the court has found no cases applying the Rooker-Feldman Doctrine to petitions to compel arbitration under 9 U.S.C. §4. Doctor's Associates, Inc. v. Distajo et al., 107 F. 3d 126, 136-38 (2nd Cir. 1997), App. 28a, 29a.

If permitted to stand the Second Circuit opinion will dramatically alter existing principles of federalism. DAI openly admitted that it was using the federal court to circumvent the $400,000.00 state judgment for which it had posted an appeal bond and filed an appeal. It was clearly appealing to the federal court to avoid the effect of the state court $400,000.00 judgment.

The prior Illinois state judgments holding the arbitration clauses void and unenforceable dramatically conflict with the subsequent Connecticut federal court judgment compelling arbitration, thereby determining that the same arbitration clauses were valid and enforceable. DAI was clearly appealing to the federal court to avoid the effect of the state court judgments.

The Federal Arbitration Act, 9 U.S.C. §1 et seq. does not pre-empt the principles of federalism. The Rooker-Feldman Doctrine applies to cases involving the Federal Arbitration Act in the same way that it applies to any other case.

The Second Circuit cited only Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Doe, 868 F. Supp. 532, 538 (S.D.N.Y. 1994) for the rule that the Rooker-Feldman Doctrine does not apply to federal

judgments entered in federal cases which were filed before the state judgment was entered. That case was not decided on that basis. There the court held that a state judgment had not been entered, although the federal plaintiff was seeking to litigate the same issues considered by the state court in entering a temporary restraining order. A temporary restraining order is not a judgment, and decides nothing on the merits. Contrary decisions on the merits may subsequently be entered in the same case. The temporary restraining order merely maintains the status quo while the parties litigate the substantive issues.

More importantly, the Second Circuit's interpretation of the Rooker-Feldman Doctrine is clearly at odds with the rationale behind the doctrine. It matters not that the federal case was filed before the state judgment was entered. It is the timing of the respective judgments that is critical. Once a state judgment is entered (even if not final for preclusion purposes) the federal court lacks subject matter jurisdiction to enter a contrary judgment on the same claims and issues or on other issues inextricably intertwined with the claims and issues determined by the state judgment.

The court should grant the petition because of the dramatic effect of the opinion below upon the principles of federalism.

III. The Petition should be granted to confirm that the Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal

courts to relitigate the issues and claims previously determined by the North Carolina state court which refused to enforce the arbitration clause, where the Connecticut federal action was filed after the state rulings and raised issues inextricably intertwined with the state rulings, i.e., the validity and enforceability of the arbitration clause, because of the national importance of this issue and the effect of the opinion below upon the principles of federalism.

DAI and Michael Johnson litigated in the North Carolina state action for more than one year before the state court entered orders denying DAI's motions to dismiss and to stay based upon the arbitration clause. App. 34a, 38a, 41a, 42a, 43a. DAI did not file its Connecticut federal action against Michael Johnson until the North Carolina state court had ruled against it on its motions to dismiss and to stay pending arbitration. Here two of the three bases for the Second Circuit's interpretation of the Rooker-Feldman Doctrine do not exist. The federal action was filed after the state court orders were entered. Approximately seven days after filing the Connecticut federal court action, DAI also appealed the North Carolina state decision. The North Carolina court ruled on substantive matters subject to appeal under North Carolina state law, i.e., the motions of DAI to stay and to dismiss based upon the enforceability and validity of the arbitration clause.

DAI was clearly appealing to the Connecticut federal court to obtain a ruling contrary to the one issued by the North Carolina state court, i.e., a judgment determining that the arbitration clause was valid and enforceable.

With respect to the North Carolina state judgment, the Second Circuit is left only with the third base for its decision, that the Rooker-Feldman Doctrine does not apply to cases involving the Federal Arbitration Act.

The Federal Arbitration Act does not pre-empt the principles of federalism, including the Rooker-Feldman Doctrine.

The issues decided by the Connecticut federal court were clearly inextricably intertwined with the issues before the North Carolina court.

The Petition should be granted because the Second Circuit opinion dramatically altered established principles of federalism by permitting judgment-debtors in state court actions to obtain federal judgments precluding enforcement of the state judgments and redetermining claims concerning the enforcement and validity of the arbitration clauses while appeals from the adverse state judgments were pending, coupled with federal injunctions barring further prosecution of the state actions in which the prior judgments were entered.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 302—August Term 1996

Argued: November 4, 1996 Decided: February 24, 1997

Docket No. 96-7321

DOCTOR'S ASSOCIATES, INC.,

Plaintiff-Appellee,

—against—

EMILY DISTAJO, et al.,

Defendants-Appellants.

Before:

FEINBERG, LEVAL and PARKER,

Circuit Judges.

Appeal from orders entered in the United States District Court for the District of Connecticut, Peter C. Dorsey, Chief Judge, granting petitions by plaintiff Doctor's Associates, Inc. (DAI) to compel arbitration of state-court claims brought by defendants Subway fran-

chisees and enjoining defendants from further prosecuting their state suits. The Second Circuit, Feinberg, J., held that: (1) the district court did not err in denying defendants' motion for a jury trial under 9 U.S.C. § 4; (2) DAI did not waive its right to arbitrate by bringing eviction actions against defendants; (3) DAI did not fraudulently induce the arbitration agreement; (4) the arbitration agreement is not unconscionable; (5) the district court did not abuse its discretion by entering two preliminary injunctions without requiring DAI to post bonds; (6) the district court had personal jurisdiction over the Kanchwala defendants; (7) the *Rooker-Feldman* doctrine did not bar jurisdiction over DAI's petitions to compel arbitration; and (8) the district court did not abuse its discretion in refusing to abstain from exercising jurisdiction over the Bickels. Affirmed.

DAVID M. DUREE, St. Louis, MO (Reinert & Duree, P.C.; Nicholas Wocl, Stamford, CT, Tooher, Puzzuoli & Wocl, Co-Counsel), *for Defendants-Appellants*.

EDWARD WOOD DUNHAM, New Haven, CT (Wiggin & Dana, Mark R. Kravitz, of Counsel), *for Plaintiff-Appellee*.

FEINBERG, Circuit Judge:

Plaintiff-appellee Doctor's Associates, Inc. (DAI), a Florida corporation, is the national franchisor of "Subway" sandwich shops. Defendants-appellants, present and former Subway franchisees, appeal from orders of

the United States District Court for the District of Connecticut, Peter C. Dorsey, Chief Judge, dated February 14, 1996, and March 14, 1996, both published at 944 F. Supp. 1010 (D.Conn. 1996), granting petitions by DAI to compel arbitration of claims the franchisees filed against DAI in various state courts. (The term "the franchisees" is used in this opinion to designate those Subway franchisees who brought state court actions against DAI and were named below as respondents in DAI's petitions to compel arbitration.) For reasons set forth below, we affirm. In a related appeal, No. 96-7011, defendants also challenge the district court's preliminary injunction dated January 3, 1996, enjoining them from prosecuting their state suits against DAI. By separate order filed today, we dismiss that appeal as moot.

We are not the first panel of this court to encounter an appeal by groups of Subway franchisees, represented by attorney David M. Duree, involving similar—if not identical—facts and legal issues regarding arbitration of disputes with DAI. We have already remanded once in this case, Doctor's Associates, Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995), cert. denied, 116 S. Ct. 1352 (1996) (*Distajo I*), and two other panels have since affirmed orders granting DAI's petitions to compel arbitration of claims by other Subway franchisees. Doctor's Associates, Inc. v. Stuart, 85 F.3d 975 (2d Cir. 1996); Doctor's Associates, Inc. v. Jabush, 89 F.3d 109 (2d Cir. 1996). At least one other appeal is pending in this court from a decision compelling franchisees to arbitrate disputes with DAI. Doctor's Associates, Inc. v. Riggs, No. 96-9141 (argument not yet scheduled). The parties have also waged battles in various other courts across the country. See Distajo I, 66 F.3d at 441 n.1 (listing other DAI/franchisee litigation). After the franchisees submitted their

initial brief in this appeal, we issued our opinion in *Stuart*, which, as discussed below, controls some of the legal issues raised in this appeal. Our decision today resolves several other legal issues in this bitter litigation.

I. Facts and Prior Proceedings

When purchasing franchises from DAI, each franchisee-defendant[1] executed a standard franchise agreement which requires the parties to arbitrate claims arising under the agreement.[2] Most of the franchise agreements state that they are governed by Connecticut law. Each franchisee-defendant also entered into a standard sublease with a leasing company affiliated with DAI. The sublease, which does not contain an arbitration clause, includes a "cross-default" provision, which allows the leasing company to evict a franchisee

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1 This appeal involves numerous individual cases, each brought by the franchisees from a particular Subway store: Doctor's Associates, Inc. v. Distajo, No. 3:94-CV-349; Doctor's Associates, Inc. v. Brenes, No. 3:94-CV-511; Doctor's Associates, Inc. v. Guerrero, No. 3:94-CV-514; Doctor's Associates, Inc. v. Youmaran, No. 3:94-CV-515; Doctor's Associates, Inc. v. Shino, No. 3:94-CV-516; Doctor's Associates, Inc. v. Loennecke, No. 3:94-CV-517; Doctor's Associates, Inc. v. Johnson, No. 3:94-CV-803; Doctor's Associates, Inc. v. Kane, No. 3:94-CV-948; Doctor's Associates, Inc. v. Gianinni, No. 3:94-CV-1108; Doctor's Associates, Inc. v. Rothmund, No. 3:94-CV-1456; Doctor's Associates, Inc. v. Papaleo, No. 3:94-CV-1457; Doctor's Associates, Inc. v. Bickel, No. 95-CV-120; Doctor's Associates, Inc. v. Kanchwala, No. 95-CV-1915.

2 The clause provides, in relevant part, that:

> [a]ny controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. . . .

for violations of either the sublease *or* the franchise agreement.[3]

Between 1991 and 1993, many disputes arose between DAI and the franchisees regarding rents, royalties and advertising fees due under the franchise agreements and subleases. To recover these monies, DAI instructed its leasing companies to file eviction actions, primarily in Illinois state court, against certain franchisees. In addition, all franchisees except the Kanes and Bickels claim that DAI routinely threatened to bring such eviction proceedings to recover alleged unpaid fees and rents.

Several months to one year after the close of these eviction proceedings, each franchisee filed a nearly identical action against DAI in state court in either Illinois, Pennsylvania, Massachusetts or North Carolina. Each suit alleged, among other things, (1) fraud with respect to DAI's policies of operating through assetless leasing companies, avoiding arbitration through use of eviction proceedings, and withholding business information from franchisees, (2) breach of contract for DAI's failure to arbitrate the disputes underlying the eviction actions, and for various unrelated violations of the franchise agreements, and (3) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, the Illinois Franchise Disclosure Act and the Lanham Act. Each franchisee requested compensation and substantial punitive damages.

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[3] The sublease provides, in relevant part, that:

> If at any time during the term of this Sublease, Sublessee shall default in the performance of any of the terms, covenants or conditions of the aforesaid Franchise Agreement . . . Sublessor, at its option, may terminate this lease . . . and upon such termination, Sublessee shall quit and surrender the leased premises to the Sublessor, but Sublessee shall remain liable for the balance of the rent due as provided in this Sublease.

Upon notice of each case filed by a franchisee, DAI immediately filed a written demand for arbitration with the American Arbitration Association in accordance with that body's Commercial Arbitration Rules (AAA Rules). When defendants refused to arbitrate their disputes, DAI filed the present petitions to compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 4. The franchisees conceded that their claims in state court raise arbitrable issues under the arbitration clause in the franchise agreements. However, they argued, among other things, that DAI fraudulently induced the arbitration clause and that DAI waived its right to arbitrate by filing or threatening to file the prior eviction actions.

In November 1994, the district court granted most of DAI's petitions to compel arbitration.[4] It rejected the franchisees' arguments that the arbitration agreement was void for lack of mutuality or as a contract of adhesion, that the agreement was unconscionable, and that DAI had waived its right to arbitrate. The court also held that the franchisees' defense of fraudulent inducement should be decided by the arbitrator. By order dated December 9, 1994, the court enjoined the franchisees from prosecuting their state court actions, in order to effectuate the judgment compelling arbitration, see 28 U.S.C. § 2283.

The franchisees appealed both orders to this court. In September 1995, we issued an opinion (Distajo I) affirming and reversing in part. We upheld the district court's rulings (1) that it had subject matter (diversity) jurisdiction, (2) that judgments the franchisees had obtained against DAI in their Illinois and North Carolina state

[4] The district court granted DAI's petitions to compel arbitration of claims brought by the Bickels and Kanchwalas in February 1995 and March 1996, respectively.

suits were not entitled to preclusive effect, and (3) that the arbitration clause was not void for lack of mutuality. On the other hand, we vacated the district court's ruling rejecting the franchisees' waiver defense to arbitration and instructed that on remand the district court should determine whether (1) "the leasing companies were mere alter egos of DAI," (2) "prosecution of those eviction actions constituted litigation of 'substantial issues going to the merits,' " and (3) "the franchisees suffered prejudice from the eviction proceedings." We also held that on remand, the district court—rather than the arbitrator—should determine whether DAI fraudulently induced the arbitration clause. Finally, we vacated the preliminary injunctions.

After the district court conducted further proceedings on remand, it filed opinions on February 14 and March 14, 1996, again granting DAI's petitions to compel arbitration. The court held that (1) the franchisees had not submitted sufficient evidentiary facts to entitle them to a jury trial on their defenses to arbitration, 944 F. Supp. at 1013-14, 1015-16, (2) DAI had not waived its right to arbitrate by bringing or threatening to bring eviction proceedings, id. at 1018-22, (3) DAI had not fraudulently induced the arbitration clause, id. at 1017-18, and (4) there was no reason for the district court to abstain based on the franchisees' state court litigation, id. at 1022-23. The franchisees challenge all of these rulings, and raise the additional arguments that (1) issues of fact remain with respect to their defenses that the arbitration clause is unconscionable and fails to meet their reasonable expectations, (2) the district court erred by entering preliminary injunctions on January 3 and March 14, 1996, without requiring DAI to post bonds, (3) the district court lacked subject matter jurisdiction to compel

arbitration, and (4) the district court lacked personal jurisdiction over the Kanchwalas.

II. Demand for a Jury Trial

The franchisees argue that the district court erred in denying them a jury trial under 9 U.S.C. § 4 on their defenses of fraud, waiver, unconscionability and failure of the contract to meet their reasonable expectations. In February 1996, the district court granted DAI's motion to forgo trial and decide these issues as a matter of law, finding that the franchisees had not shown that material facts were in dispute with respect to their defenses of fraud and waiver.[5] 944 F. Supp. at 1013-15. The franchisees then filed additional affidavits purportedly substantiating these defenses, and moved for reconsideration. In March, the district court denied that motion, observing that the franchisees had waited five to 23 months from the time DAI filed its petitions to submit such affidavits. Id. at 1016. Nevertheless, the court agreed to consider the facts alleged in their "belated" affidavits in ruling on their defenses as a matter of law. Id.

Although a party may demand a jury trial when issues respecting arbitrability are "in issue," 9 U.S.C. § 4, we have cautioned that "[a] party resisting arbitration . . . 'bears the burden of showing that he is entitled to a jury trial.' " Stuart, 85 F.3d at 983 (citing Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1154 (5th Cir. 1992)). As when opposing a motion for summary judgment under Fed.R.Civ.P. 56, the party requesting a jury trial must "submit evidentiary facts showing

[5] As discussed in Part V below, defendants did not submit the issues of unconscionability and failure of the contract to meet their expectations to the district court at that time.

that there is a dispute of fact to be tried." Oppenheimer & Co., Inc. v. Neidhardt, 56 F.3d 352, 358 (2d Cir. 1995); Stuart, 85 F.3d at 983-84 (party must demonstrate a "genuine" issue); see Manning v. Energy Conversion Devices, Inc., 833 F.2d 1096, 1103 (2d Cir. 1987).

Even after conducting discovery on their defenses, the franchisees have failed to satisfy this burden. The district court diligently complied with our direction in *Distajo I* that it "consider[ ]" the franchisees' jury demands. 66 F.3d at 456 n.13. As discussed separately below, the franchisees have not shown, even in their most recent affidavits, that material facts are in dispute regarding their fraud and waiver defenses. Moreover, by submitting the bulk of their affidavits at the last minute, the franchisees utterly failed to "alert [the] district court[ ] promptly and fully" to the facts underlying these claims. Manning, 833 F.2d at 1103. We thus affirm the district court's decision to proceed without a jury trial and rule on the defenses as a matter of law.

III. Waiver of the Right to Compel Arbitration

All the franchisees except the Bickels and Kanes argue that DAI waived its right to compel arbitration of their state-court claims based on DAI's conduct in connection with prior litigation proceedings. Specifically, DAI obtained judgments of eviction against certain franchisees.[6] 944 F. Supp. at 1019-20. Brenes, the Rothmunds and the Kanchwalas all lost their franchises as a result of these eviction proceedings. Eviction actions against another group of franchisees[7] were dismissed at

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[6] Jose Brenes, Wesam and Linda Youmaran, Ronald and Patricia Rothmund, and Michael and Anver Kanchwala and Azim Hemani.

[7] Emily and Renato Distajo and Constantine and Milo Lamando, Alvaro and Maria Guerrero, Bruno Giannini, and John Papaleo. DAI dis-

an early stage because, under state law, DAI's unregistered leasing companies could not file lawsuits in the relevant states. Id. DAI has never filed eviction proceedings against a third group of franchisees.[8] Id. at 1019. However, the franchisee-defendants (except the Kanes and Bickels) allege that DAI routinely threatened them with eviction in order to resolve its claims under the franchise agreements and subleases. The district court found that there were no material issues of fact in dispute, and held that as matter of law DAI did not waive its right to compel arbitration of franchisees' claims. 944 F. Supp. at 1020-22. We agree.

We review de novo the issue whether a party waived its right to compel arbitration. Stuart, 85 F.3d at 981 (citing Leadertex, Inc. v. Morgantown Dyeing & Finishing Corp., 67 F.3d 20, 25 (2d Cir. 1995)). "The factual determinations upon which to base the waiver determination, however, will not be reversed unless clearly erroneous." Stuart, 85 F.3d at 981. Because of the strong federal policy favoring arbitration, courts resolve doubts as to whether waiver occurred in favor of arbitration. Id. (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). In *Stuart*, we cautioned that "[t]he waiver determination must be based on the circumstances and context of the particular case, 'with a healthy regard for the policy of promoting arbitration.' " Stuart, 85 F.3d at 981 (quoting Leadertex, 67 F.3d at 25)).

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missed the action against Papaleo, who abandoned his store and ceased operation as a Subway franchisee for financial reasons while the eviction action was pending.

[8] Julie and Johnson Shino and Albert and Laylan Yonan, Louis Loenneke and Mary Ann Bookout, Michael Johnson, Gregory and Deborah Kane, and Raymond and Sandra Bickel.

On appeal, the franchisees make an elaborate argument that either Illinois or Connecticut law should apply, or at least "have some significance," on the waiver issue. However, they apparently waived this choice-of-law argument by not raising it in the district court. In any event, the Supreme Court has held that the FAA creates a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses Cone, 460 U.S. at 24; National Union Fire Co. of Pittsburgh v. Belco Petroleum Corp., 88 F.3d 129, 133 (2d Cir. 1996); see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos, 553 F.2d 842, 845 n.4 (2d Cir. 1977) (applying federal law to waiver issue). The franchisees do not contest that the FAA applies to this dispute, nor could they because the franchise agreements between DAI, a Florida corporation, and franchisees from various other states "evidence[ ] a transaction involving commerce." 9 U.S.C. §§ 1, 2; Allied-Bruce Terminex Comps. v. Dobson, 115 S. Ct. 834, 840-41 (1995) (§ 2's "involving commerce" standard reaches to limits of Commerce Clause power). As we recently explained, even the inclusion in the contract of a general choice-of-law clause does not require application of state law to arbitrability issues, unless it is clear that the parties intended state arbitration law to apply on a particular issue. See Belco, 88 F.3d at 134-35 (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1217-19 (1995)).

We have often stated the general rule that waiver of the right to arbitrate occurs when a party "engages in protracted litigation that results in prejudice to the opposing party." Cotton v. Slone, 4 F.3d 176, 179 (2d Cir. 1993) (citing Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991)); Sweater Bee By Banff, Ltd. v.

Manhattan Indus., 754 F.2d 457, 461 (2d Cir. 1985) ("[L]itigation of substantial issues going to the merits may constitute a waiver of arbitration."). The "prejudice" that supports a finding of waiver can be "substantive" prejudice to the legal position of the party opposing arbitration, such as when the party seeking arbitration "loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration," Kramer, 943 F.2d at 179, or obtains information through discovery procedures not available in arbitration, Cotton, 4 F.3d at 179. Additionally, we have held that a party may be prejudiced by the "unnecessary delay or expense" that results when an opponent delays invocation of its contractual right to arbitrate. Id. (citing Kramer, 943 F.2d at 179).

Initially, we must determine the effect of our opinion in *Distajo I* on resolution of the franchisees' waiver arguments. DAI argues on appeal that, in the eviction proceedings, it did not litigate "substantial issues going to the merits" of the franchisees' current claims. The franchisees vigorously contend that the doctrine of "law of the case" prevents our reaching this argument because we stated in *Distajo I* that

> [i]f the alleged violations of the subleases were premised on violations of the franchise agreement (which DAI was contractually bound to resolve through arbitration) then DAI did litigate substantial issues going to the merits, and the only remaining question will be whether the franchisees suffered prejudice from the eviction proceedings.[9]

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[9] Except with respect to the Kanchwalas, both parties agree that the eviction actions were premised, at least in part, on violations of the franchise agreements. We also held in *Distajo I* that waiver could only apply if "DAI was responsible for the eviction proceedings" brought by its

Distajo I, 66 F.3d at 457. The district court rejected the franchisees' waiver defense solely on the ground that they had not proven sufficient prejudice. 944 F. Supp. at 1019-21.

We do not believe we are so constrained. The doctrine of "law of the case" instructs that " 'if a court decides a rule of law, that decision should continue to govern in subsequent stages of the same case.' " Sagendorf-Teal v. County of Rensselaer, 100 F.3d 270, 277 (2d Cir. 1996) (citing DiLaura v. Power Authority of State of New York, 982 F.2d 73, 76 (2d Cir. 1992)). However, the doctrine "is, at best, a discretionary doctrine, which does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided." United States v. Martinez, 987 F.2d 920, 923 (2d Cir. 1993) (citations and internal quotations omitted). For instance, a court may properly reconsider a prior statement of law when new evidence indicates that its prior view was unsound. See Sagendorf-Teal, 100 F.3d at 277.

In *Distajo I*, responding to two issues raised by the district court's November 1994 order compelling arbitration, we focused on (1) the relationship between DAI and the leasing companies that filed the eviction proceedings, and (2) whether the court or the arbitrator should rule on defendants' waiver defense. After a thorough discussion of the latter issue, we held that the district court should decide whether DAI had waived arbitration. 66 F.3d at 453-56. We apparently assumed that the franchisees brought their state suits in direct response to DAI's eviction actions, and that their state suits and the eviction actions raised identical issues.

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leasing companies. 66 F.3d at 457. DAI has since stipulated to responsibility for such actions.

However, DAI argues—without contradiction from the franchisees—that neither the parties nor the court focused in that appeal on the similarity (or lack thereof) of the issues raised in DAI's eviction actions and the franchisees' state suits. This factor is, of course, significant in considering whether DAI litigated "substantial issues going to the merits" of the claims it now seeks to arbitrate. In view of our clearer understanding now, after remand, of the nature and scope of prior litigation by DAI, it would serve no justifiable purpose to adhere blindly to a statement in *Distajo I* that was based on an incomplete picture of the relevant facts.[10] Cf. Cotton, 4 F.3d at 179 (waiver "necessarily depends upon the facts of the particular case"). We thus feel compelled to explore more fully whether DAI engaged in the type of prior litigation which results in waiver of its right to arbitrate.

First, we can easily dispose of the argument that DAI waived its right to arbitrate claims brought by franchisees against whom DAI never instituted eviction proceedings. In *Stuart*, we held that DAI "obviously" had not waived its right to arbitrate claims brought by franchisees against whom DAI had never instituted " 'particular eviction proceedings.' " Stuart, 85 F.3d at 982. The franchisees nevertheless insist that waiver occurred when, unlike in *Stuart*, DAI *threatened* certain franchisees with eviction, allegedly to "extort" payments from them. However, mere threats of litigation do not even constitute "litigation," and thus certainly cannot be considered "substantial litigation on the merits" for waiver analysis. Cf. Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1165 (5th Cir. 1987) (state-

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[10] We note that this panel includes a member of the panel in *Distajo I*.

ment suggesting party would not arbitrate did not "constitute *action* inconsistent with arbitration").

The remaining franchisees' waiver defenses also fail. We first note that the district court found that DAI's eviction actions against certain franchisees (listed above) were dismissed at an early stage, before any adjudication of the merits occurred.[11] 944 F. Supp. at 1019-20. DAI's participation in these suits did not constitute "protracted" litigation, which could result in a waiver of its right to arbitrate. Compare Leadertex, 67 F.3d at 26 (waiver when defendant engaged in "energetic pursuit of discovery" for seven months and requested arbitration "at the eleventh hour" before trial), and Cotton, 4 F.3d at 179-80 (waiver when defendant "actively litigated" dispute by taking depositions and making substantive motions), with Lecopulos, 553 F.2d at 845 (filing an action does not waive arbitration, at least until opponent "has answered on the merits").

In any event, we hold that DAI did not waive its right to arbitrate because in none of the eviction proceedings—even those four actions in which DAI won judgments of eviction—did DAI engage in litigation on the merits of the issues now raised in the franchisees' state suits. DAI persuasively argues that

> [t]here is no conceivable policy justification for a rule that, by exercising the reasonable business judgment to sue to evict someone from leased premises or to collect a debt of less than $10,000, a

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[11] The district court found that in the eviction action against the Kanchwala defendants, DAI claimed only unpaid rent due under the sublease, a non-arbitrable issue. 944 F. Supp. at 1020. The district court correctly held that litigation of non-arbitrable claims does not waive a party's right to arbitrate other, arbitrable claims. Sweater Bee, 754 F.2d at 463; Seguros Banvenez, S.A. v. S/S Oliver Drescher, 761 F.2d 855, 862 (2d Cir. 1985).

> party waives for all time its right to arbitrate every other dispute imaginable, including multimillion dollar punitive damage claims of which the party has no knowledge when it files the eviction action.

Moreover, our prior decisions do not compel a finding of waiver here. If anything, they support the view that only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate. In Gilmore v. Shearson/Am. Express, Inc., 811 F.2d 108 (2d Cir. 1987), we clearly suggested that defendant Shearson's explicit waiver of its right to arbitrate certain claims would not necessarily waive arbitration of other claims raised in an amended complaint filed after Shearson agreed to this waiver. Id. at 113. We held that because the amended complaint did not "alter the scope or theory" of the claims as to which Shearson had already waived arbitration, Shearson could not renounce its waiver and compel arbitration. Id. at 114; cf. Kramer, 943 F.2d at 178 (waiver based in part on party's prior litigation in an "identical" suit); Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 122 (2d Cir. 1991) (no waiver when prior litigation was brought by a separate party and involved "legally distinct claims").

Other circuits seem to agree that waiver can only occur when a party has previously litigated the same claims it now seeks to arbitrate. The Seventh Circuit has held that a franchisor who brought an unlawful detainer action against its franchisee had not waived its right to arbitrate other claims brought by the franchisee—including breach of contract, failure to pay royalties and advertising fees, and several Lanham Act claims—because the two suits "involved different issues." Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 330-332 (7th Cir. 1995); but see

Midwest Window Sys., Inc. v. Amcor Indus., Inc. 630 F.2d 535, 537 (7th Cir. 1980). Similarly, in *Lawrence*, Judge Alvin B. Rubin held that a franchisor, who had previously secured a judgment against a franchisee to recover $5,000 for services provided, had not waived its right to arbitrate subsequent claims by the franchisee that the franchise agreement was illegal and unenforceable. Lawrence, 833 F.2d at 1164-65 (earlier action had not "prejudiced their present claim"). Finding waiver where a party has previously litigated an unrelated yet arbitrable dispute would effectively abrogate an arbitration clause once a party had litigated *any* issue relating to the underlying contract containing the arbitration clause.

The franchisees apparently argue that even under this rule we should find waiver because their current suits and the eviction actions "aris[e] out of the same core facts, i.e., the franchise agreement and franchise relationship." We disagree. According to DAI, the eviction actions were simple collection proceedings to recover relatively small amounts of unpaid fees and rents under the franchise agreements and subleases. The only issues involved in these disputes pertained to whether (and how much) the franchisees owed DAI. In contrast, the franchisees' state suits, filed several months to one year after the evictions, allege various violations by DAI of the franchise agreement and attack the validity of the franchise agreement and arbitration clause on a host of different federal and state law grounds. Significantly, the franchisees did not raise these claims as counterclaims in the eviction actions, nor do they now dispute that they owed the fees and/or rents which DAI sought to collect by filing eviction actions. Thus, the district court properly found that "the disputes involved in the eviction

actions are not the same as the disputes involved in the franchisees' state court actions." 944 F. Supp. at 1022. In view of the strong federal policy of enforcing agreements to resolve disputes through arbitration, we find that DAI did not litigate substantial issues going to the merits of the franchisees' current claims, and thus did not waive arbitration.

Finally, the franchisees argue strenuously that they suffered various types of prejudice from these evictions, including the legal expense of defending the actions, the risk of losing their entire investment in their franchises and, for some of the franchisees, the money judgments or actual loss of their stores. Strictly speaking, in view of our holding above, it is not necessary for us to decide whether the franchisees suffered prejudice from being subject to these eviction actions. It is nevertheless clear to us that they did not suffer the type of prejudice that supports a finding of waiver.

We do not overlook the fact that several franchisees lost their entire investments in their franchises as a result of the judgments of possession DAI obtained. However, prejudice as defined by our cases refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue. Stated in these terms, the franchisees have not shown any prejudice warranting a finding of waiver. First, the franchisees admit that DAI did not delay in moving to compel arbitration of their present claims in state court. 944 F. Supp. at 1021. Moreover, legal expenses inherent to litigation, "without more," do not constitute prejudice requiring a finding of waiver. Leadertex, 67 F.3d at 26. Finally, the franchisees have not shown that they will suffer "substantive" prej-

udice to their state-court claims if they are forced to arbitrate. See Lawrence, 833 F.2d at 1165. DAI has neither conducted discovery with respect to these claims nor made any motions going to the merits of the claims. Significantly, DAI has assured us that, in arbitration, it will not oppose any of the franchisees' claims on res judicata or collateral estoppel grounds due to the franchisees' failure to raise them in the prior eviction actions.

On these facts, we hold that DAI did not waive its right to compel arbitration of the franchisees' claims.

IV. Fraudulent Inducement of the Arbitration Agreement

The franchisees argue that the district court erred in rejecting, as a matter of law, their defense that DAI fraudulently induced them to accept the arbitration clause. Specifically, they claim that DAI (1) falsely represented in its offering circulars and franchise agreements that arbitration is a "condition precedent" to litigation, and (2) concealed the material fact that DAI "controls" its franchisees by instructing its assetless leasing companies to threaten or institute eviction proceedings. The district court found—even after considering the franchisees' last-minute affidavits—that there were no material issues of fact in dispute, and held that the franchisees had not "offered evidence from which it could be found" that DAI had made any false representations that induced their agreement to arbitrate. 944 F. Supp. at 1017-18.

It is clear that a court, not an arbitrator, resolves a claim that an arbitration clause—as opposed to the contract as a whole—was fraudulently induced. *Distajo I*, 66

F.3d at 457 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)). We apply state law "concerning the validity, revocability, and enforceability of contracts generally" to the issue whether DAI fraudulently induced the arbitration agreement. See Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); Stuart, 85 F.3d at 979-80 (applying, without discussion, Connecticut law to franchisees' fraudulent inducement claim); Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45-46 (2d Cir. 1993) (state law applies to whether parties agreed to arbitrate).

The franchisees maintain that we should apply Illinois law on fraudulent inducement. The district court applied Connecticut law pursuant to the choice-of-law clause in most of the relevant franchise agreements. It noted with respect to certain franchisees, whose contracts designated Florida or Illinois law as controlling, that DAI claimed, "without contradiction, that Florida and Illinois law do[ ] not differ" from Connecticut law on fraudulent inducement. 944 F.Supp at 1017 n.2. Thus, the franchisees waived this issue, and, as in *Distajo I*, 66 F.3d at 451, and *Stuart*, 85 F.3d at 979-80, we apply Connecticut law to their fraud claims.

It is well-settled under Connecticut law that to prove fraudulent inducement, a party must show "(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury." Stuart, 85 F.3d at 979 (citing Miller v. Appleby, 438 A.2d 811, 813 (Conn. 1981)). In *Stuart*, we held that Subway franchisees making similar allegations "utterly failed to allege, much less prove, sufficient facts indi-

cating that they were defrauded into agreeing to arbitrate." Stuart, 85 F.3d at 980. We explained that before purchasing their franchise, each franchisee received copies of DAI's standard franchise agreement and sublease, and that the relevant clauses pertaining to arbitration and eviction "were not camouflaged." Id. We thus found that DAI had not made any false representations to the franchisees regarding the possibility of eviction for violation of the franchise agreement.

The district court made identical factual findings in this case with respect to the franchisees' access to copies of the franchise agreement and sublease and the contents of those documents. It concluded that "[a]t most, [the franchisees] lacked understanding of the ramifications of two documents which they had ample opportunity to read and understand. . . . They cannot hold DAI as misrepresenting what is plainly stated in the documents nor the legal ramifications thereof." 944 F. Supp. at 1018; see Stuart, 85 F.3d at 980.

On this record, we too "find that the district court properly held, as a matter of law, that DAI did not fraudulently induce [the franchisees] into signing the agreement to arbitrate." Id.

V. Unconscionability and Failure of the Contract to Meet the Parties' Reasonable Expectations

The franchisees argue that issues of fact remain with respect to their defenses that the arbitration clause is void and unenforceable because it is (1) unconscionable, and (2) fails to meet their reasonable contractual expectations, see Restatement (Second) of Contracts § 211. In their answers in the district court, most of which were filed in October 1994, the franchisees alleged that the

franchise agreement was an adhesion contract that effectively forced them to arbitrate disputes under the agreement, yet allowed DAI to resolve such disputes through eviction proceedings. They also complained that the contract did not mention the alleged "excessive" costs of arbitration. Id.

The franchisees waived this argument by not raising it to the district court in their papers opposing DAI's motion, filed in February 1996, to forgo trial and receive judgment as a matter of law on all defenses to arbitration. In any event, the franchisees' claims are meritless. They urge us to "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' " Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985). Yet the franchisees have not presented a "well-supported" claim in this regard. In Doctor's Associates, Inc. v. Jabush, 89 F.3d 109 (2d Cir. 1996), we rejected a claim by Subway franchisees, who had been sued by DAI in eviction proceedings, that the arbitration clause was unconscionable. Id. at 112-13. We explained that the franchisees were not unfairly surprised or oppressed by DAI's resort to eviction proceedings because the "plain terms" of the sublease authorized such action. Id. at 113 (citing David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 249 (2d Cir. 1991). In *Stuart*, we rejected the franchisees' argument that the costs of arbitration rendered the contract unconscionable, observing that the franchise agreement clearly stated that the franchisees would have to pay standard arbitration costs. Stuart, 85 F.3d at 980-81. Thus, even if the franchisees had properly raised

these arguments, they would fail under the reasoning of our prior cases.

VI. Imposing Preliminary Injunctions Without Requiring a Bond

The franchisees argue that the district court abused its discretion by issuing preliminary injunctions in January and March 1996, without requiring DAI to post bonds pursuant to Fed.R.Civ.P. 65(c). In January 1996, after our remand in *Distajo I*, the district court enjoined the franchisees from prosecuting their state cases, finding that this relief was "necessary in aid of" federal jurisdiction. 944 F. Supp. 1007, 1008-09 (citing 28 U.S.C. § 2283). In its March 14 order compelling arbitration, the district court continued the injunction to "effectuate" that order. 944 F. Supp. at 1023. The district court did not require DAI to post a bond for either injunction because it found that defendants would not suffer damage or loss from being forced to arbitrate in lieu of prosecuting their state-court cases.

Rule 65(c) states, in relevant part, that

> [n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Id. In *Stuart*, we flatly rejected an identical argument that the district court should have required such a bond. Rule 65(c) gives the district court wide discretion to set the amount of a bond, and even to dispense with the bond requirement "where there has been no proof of

likelihood of harm, or where the injunctive order was issued 'to aid and preserve the court's jurisdiction over the subject matter involved.' " Stuart, 85 F.3d at 985 (citations omitted). As in *Stuart*, both circumstances apply in this case. We therefore hold that the district court did not abuse its discretion by entering the injunctions without requiring DAI to post bonds.

VII. Personal Jurisdiction over the Kanchwala Franchisees

The Kanchwala franchisees argue that the district court did not have personal jurisdiction over them. They allege that DAI violated 9 U.S.C. § 4 and Fed.R.Civ.P. 4(c) and 4(e)(1) by serving the Kanchwalas by mailing a copy of the summons and complaint to Mr. Duree, their attorney, instead of personally serving them. The Kanchwala franchisees also claim that the district court did not have personal jurisdiction and venue "by contract" because the validity of the arbitration contract was in dispute. They base this argument on the fact that in October 1995 an Illinois court held that the arbitration clause in the Kanchwalas' franchise agreement was void and unenforceable. Finally, they argue that "at the very least" the district court should have held a hearing under Fed.R.Civ.P. 12(d) to determine personal jurisdiction.

By not raising these issues in their papers filed in opposition to DAI's motion for judgment as a matter of law and by failing to request in the district court a hearing under Rule 12(d), the Kanchwalas consented to personal jurisdiction. In any event, faced with identical arguments in *Stuart*, we applied the long-standing principle that a party who agrees to arbitrate in a state (such as Connecticut) in which the FAA makes arbitration

agreements enforceable also consents to jurisdiction in whatever court could compel arbitration in that state. Stuart, 85 F.3d at 979 (citing Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 363 (2d Cir. 1964)). Moreover, we held that the AAA Rules, incorporated into all Subway franchise agreements, governed service of process and specifically allowed service by mail on a party's representative. Id. at 982. Finally, we decided that the district court had handled the question of personal jurisdiction correctly from a procedural point of view by holding a hearing on whether the arbitration agreement was enforceable. Id.; cf. AAACon Auto Transp., Inc. v. Klee, 356 F. Supp. 319, 321 (S.D.N.Y. 1973) (district court may hold hearing to ascertain whether parties entered an agreement to arbitrate). We see no logical reason to reach a different result here, and thus hold that the district court did have personal jurisdiction over the Kanchwala franchisees.

VIII. Rooker-Feldman Doctrine

The franchisees argue, for the first time on appeal, that the district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine to order them to arbitrate and to enjoin them from prosecuting their state suits. They contend that DAI's petitions to compel arbitration represent impermissible attempts to "avoid" judgments the franchisees obtained in Illinois state court.

After DAI filed petitions in the district court to compel arbitration, two Illinois courts issued orders granting summary judgment to certain franchisees. Shino v. Doctor's Associates, Inc., No. 93-L-1293 (Cir. Ct. Madison County, Oct. 24, 1994); Kanchwala v. Doctor's Associ-

ates, Inc., No. 95-L-1292 (Cir. Ct. Madison County, Oct. 13, 1995). The Illinois courts held that DAI waived its right to arbitrate claims by those franchisees against whom DAI had filed eviction actions. The courts also held that the arbitration clauses in the franchise agreements were void and unenforceable because they (1) were unconscionable, (2) failed to meet the parties' reasonable contractual expectations, and (3) lacked mutuality.

Some explanation of the tangled proceedings in the Bickel case is also necessary. In December 1994, the Bickels filed an action against DAI in the Circuit Court of Madison County, Illinois, alleging fraud, various breaches of the franchise agreement, and seeking a declaration that the arbitration clause was unenforceable. In mid-January 1995, DAI promptly filed both a demand with the AAA for arbitration of the Bickels' claims and its present petition to compel arbitration. Because DAI did not appear in the Illinois action, the Bickels moved for and obtained from the Illinois court on February 7, 1995, a default judgment against DAI. That court scheduled a damage hearing for April.

Only days later, on February 13, the district court granted DAI's petition to compel arbitration of the Bickels' claims, and entered a preliminary injunction by endorsement enjoining the Bickels from further prosecuting their Illinois suit. In September 1995, in *Distajo I*, we reversed the district court's order compelling arbitration and vacated the preliminary injunction. Distajo I, 66 F.3d at 458. The mandate issued on November 29, 1995.

Thereafter, on December 5, 1995, the district court entered a temporary restraining order (TRO), again

enjoining the Bickels from prosecuting their state suit. The Bickels admit that they did not advise the Illinois court of this TRO. Consequently, on December 6, 1995, stating that it had been "advised" that our decision in *Distajo I* lifted the injunction against the Bickels, the Illinois court awarded the Bickels $400,000 in damages. The Bickels now argue that this $400,000 state court judgment strips the district court of subject matter jurisdiction to entertain DAI's petition to compel arbitration.

A challenge to a federal court's subject matter jurisdiction under the *Rooker-Feldman* doctrine "may be raised at any time by either party or *sua sponte* by the court." Moccio v. New York State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996) (citing Ritter v. Ross, 992 F.2d 750, 752 (7th Cir. 1993)). The doctrine evolved from the Supreme Court's opinions in D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). It rests on the principle that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." Feldman, 460 U.S. at 482; Rooker, 273 U.S. at 416. The *Feldman* Court thus held that a district court lacked subject matter jurisdiction to entertain a federal suit attacking a state court judgment against a particular individual. Feldman, 460 U.S. at 483-86. However, the Court held that a plaintiff could still bring in federal district court a general challenge to a state rule, id., unless the issues raised were "inextricably intertwined" with those resolved in the state judgment against the individual, id. at 482 n.16.

DAI complains that the franchisees' *Rooker-Feldman* argument merely restates their argument on appeal in *Distajo I* that the district court should have given preclusive effect to state court judgments holding the franchise

agreements to be void and unenforceable. We rejected that argument because the Illinois judgments were not final under that state's rule until the time for appeal had expired, and therefore not entitled to preclusive effect. Distajo I, 66 F.3d at 449-51.

Nevertheless, we cannot dismiss the franchisees' *Rooker-Feldman* argument based on the preclusion analysis applied in *Distajo I*. We did recently hold that the *Rooker-Feldman* doctrine "at a minimum" is coextensive with preclusion principles. Moccio, 95 F.3d at 199-200. Thus, subsequent litigation in federal court "will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion." Id. at 200. However, a district court may lack subject matter jurisdiction under the *Rooker-Feldman* doctrine even when that court would not be precluded, under res judicata or collateral estoppel principles, by a prior state judgment. "It cannot be the meaning of *Rooker-Feldman* that, while the inferior federal courts are barred from reviewing *final* decisions of state courts, they are free to review interlocutory orders." Campbell v. Greisberger, 80 F.3d 703, 707 (2d Cir. 1996) (*Rooker-Feldman* challenge to interlocutory order); Gentner v. Shulman, 55 F.3d 87, 89 (2d Cir. 1995) (*Rooker-Feldman* applies whether an order is "final or interlocutory in nature"). Thus, our holding in *Distajo I* that preclusion did not attach to Illinois judgments that were not final does not resolve the franchisees' *Rooker-Feldman* claim.

Nevertheless, we hold that the *Rooker-Feldman* rationale does not bar jurisdiction over DAI petitions to compel arbitration. We cannot say that DAI is attempting to appeal from any of the state court decisions. See Gash Assoc. v. Village of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993) (*Rooker-Feldman* prohibits a district court

from exercising an appellate function over a state court). Indeed, DAI filed its petitions to compel arbitration of the franchisees' state actions *before* the state courts had made any rulings on the merits in those actions. See Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1143 (2d Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987) (*Rooker-Feldman* applicable "[o]nce a litigant has received an adverse adjudication" on an issue); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Doe, 868 F. Supp. 532, 538 (S.D.N.Y. 1994) (plaintiff was not seeking review of state court TRO because it filed its federal action before the state court issued the TRO). Moreover, with respect to the Bickels' $400,000 default judgment, the Bickels admit that they did not tell the Illinois court of the TRO entered by the district court after the remand in *Distajo I*. Finally, the parties have not cited, nor have we found, any cases applying the *Rooker-Feldman* doctrine to deprive a district court of subject matter jurisdiction over a petition to compel arbitration under 9 U.S.C. § 4. On these facts, we cannot say that the district court lacked jurisdiction under *Rooker-Feldman* to adjudicate DAI's petitions to compel arbitration.

IX. Abstention

The Bickels argue that, in view of the $400,000 Illinois state court judgment described above, the district court abused its discretion by not abstaining from exercising jurisdiction over DAI's petition to compel arbitration. The district court observed that this argument was a "slightly modified version" of the Bickels' unsuccessful argument that the district court was precluded from exercising jurisdiction by reason of the Illinois court's judgment. 944 F. Supp. at 1022. In addition, the

district court held that abstention under *Moses Cone* was not warranted because the Illinois court had not engaged in "substantial proceedings" in entering the default judgment against DAI, compared to the two years of proceedings already completed in the district court in these consolidated cases. Id. at 1022-23.

We review a district court's decision *not* to abstain for abuse of discretion. Tribune Co. v. Abiola, 66 F.3d 12, 15 (2d Cir. 1995); see Sheerbonnet, Ltd. v. American Exp. Bank Ltd., 17 F.3d 46, 48 (2d Cir.), cert. denied, 115 S.Ct. 67 (1994). This review is less "rigorous" than that required when a district court *does* abstain, because the district court has "considerably broader discretion" when denying a party's motion to abstain. Tribune, 66 F.3d at 15.

The franchisees have failed to articulate any persuasive reason why abstention would be proper in this case. Certainly, as the district court found, the Illinois default judgment, entered without an evidentiary hearing, does not constitute a "substantial" state proceeding warranting abstention under *Moses Cone*. See 460 U.S. at 21-22. We hold that the district court did not abuse its discretion by exercising jurisdiction over DAI's petition to compel arbitration of the Bickels' state-court claims.

X. Conclusion

We have considered all of the franchisees' arguments, and they are without merit. We affirm the judgment of the district court.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Doctor's Associates, Inc.	)	
v.	)	
Emily Distajo, et al.	)	Motion to Dismiss
	)	

Filed
April 18, 1996

Doctor's Associates, Inc. ("DAI") requests that the appeal be dismissed, on the ground that it is moot.

ORDER

Hon. Feinberg, Leval, Parker, C.JJ.
Filed February 24, 1997.

IT IS HEREBY ORDERED that the motion be and it hereby is granted on the grounds that the appeal is moot.

2/24/97
Date

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of April, one thousand nine hundred and ninety-seven.

Doctor's Assoc. Inc.
Plaintiff-Appellee

v.

Dkt No: 96-7011
Filed April 24, 1997

Distajo
Defendant-Appellant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Emily Distajo, et al.,

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of April, one thousand nine hundred and ninety-seven.

Doctor's Assoc. Inc.
Plaintiff-Appellee

v.

Dkt No: 96-7321
Filed April 24, 1997

Distajo
Defendant-Appellant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Emily Distajo, et al.,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
State of North Carolina
County of Gaston

No.

Michael Johnson, *
*
Plaintiff, *
*
vs. *
*
Doctor's Associates, Inc., *
et al. *
*
Defendants. *

ORDER

FINDINGS OF FACT:

1. This action was commenced by the Plaintiff's filing a complaint seeking damages for misappropriation of funds;

2. The Plaintiff is a franchisee of several Subway Sandwich store franchises in North Carolina. Doctor's Associates is the franchiser;

3. The franchise agreement contains an arbitration clause which provides as follows:

> C. Any controversy or claim arising out of, or relating to this contract, or the breach thereof, shall be

> settled by arbitration in accordance with the commercial arbitration of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, or whichever city in which the company is then headquartered, and judgment upon an award rendered by the arbitrators may be entered in any Court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of, or relating to this contract is a condition precedent to the commencement of legal action by either party.

4. In his complaint, Plaintiff alleges that the arbitration clause is void for illegality, lack of mutuality and fraud;

5. The Defendant Doctor's Associates, Inc., has filed a Motion to Dismiss for failure to state a claim and, in the alternative, a Motion to Stay the Proceedings pending completion of arbitration proceeding;

6. The hearing on these motions was held before the undersigned Judge;

7. After the hearing, the Court entered an order denying the Motion to Dismiss for failure to state a claim and ordering the parties to file supplemental briefs and affidavits on the issue of whether the Plaintiff waived his right to litigate by participating in arbitration;

Based on the evidence presented at the hearing, and as set forth in the supplemental affidavits, and after having considered the arguments of counsel, the Court makes the following additional findings of fact:

1. Doctor's Associates filed a demand for arbitration with the American Arbitration Association (AAA) on or about the 26th day of January 1993;

2. Attorney David W. Smith, III, acting on behalf of the Plaintiff, filed an answer and counterclaim on February 10, 1993, and also submitted a five hundred dollar administrative fee to the AAA;

3. In his answer the Plaintiff denied the allegations in Doctor's Associates' statement for arbitration and in his counterclaim, sought an award of damages based on his contention that an employee of Doctor's Associates had misappropriated the Plaintiff's funds. Plaintiff did not challenge the validity of the arbitration clause or object to the jurisdiction of AAA to arbitrate the parties' claims;

4. On April 7, 1993, Plaintiff filed an objection to the jurisdiction and authority of the AAA to proceed with arbitration. The basis for the objection was that the arbitration provision in the franchise agreement was void and unenforceable because of illegality, lack of mutuality and fraud;

5. On April 14, 1993, pursuant to Rule 8 of the Commercial Arbitration Rules of the AAA, Plaintiff filed a motion with the AAA to amend its counterclaim. The motion was filed "under protest" and specifically set forth the basis on which the Plaintiff contested the jurisdiction of the AAA to arbitrate the matters. On the same date, the Plaintiff filed with the AAA a motion to appoint additional arbitrators;

6. The AAA is currently holding the matter in abeyance pending the decision of this Court on whether the parties are required to arbitrate or may litigate the issues in dispute;

7. To this point, the AAA has appointed one arbitrator but it has not ruled on the Plaintiff's motions to appoint additional arbitrators or the Plaintiff's motion to file an amended counterclaim;

8. The parties have not exchanged exhibits or witness lists nor has any evidence been taken in the arbitration;

BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSION OF LAW:

1. This Court has jurisdiction over the parties and the subject matter of this order;

2. The Plaintiff's limited participation in the arbitration proceedings did not constitute a waiver of his right to challenge the enforceability of the arbitration clause;

IT IS THEREFORE ORDERED, ADJUSTED AND DECREED that Doctor's Associates' motions to dismiss or to stay these proceeding on the grounds that Plaintiff has waived his right to litigate the issues that are the subject of this action by participation in arbitration are denied.

This the 3rd day of May, 1994.

S/JOHN MULL GARDNER
Superior Court Judge Presiding

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
State of North Carolina
Gaston County

MICHAEL JOHNSON,	]	
	]	
Plaintiff,	]	
	]	
vs.	]	ORDER
	]	
DOCTORS ASSOCIATES, INC., et al.	]	
	]	
Defendants.	]	

THIS MATTER coming on to be heard and being heard before the undersigned Superior Court Judge presiding at the February 28, 1994, Gaston County Civil Term of Court upon Motions to Dismiss for failure to state a claim under Rule 12 (b) (6) of the North Carolina Rules of Civil Procedure; such Motions being brought by defendants Doctors Associates, Inc., Frederick Deluca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj, and North Carolina Subway Group, Inc., by their respective counsel; and it appearing to the Court after arguments by counsel for all parties involved that the Complaint does state a claim;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the moving Defendants' Motions to Dismiss for failure to state a claim pursuant to Rule 12 (b) (6) of the North Carolina Rules of Civil Procedure be and hereby are denied.

This the 17th day of May, 1994.

S/JOHN MULL GARDNER
Superior Court Judge Presiding

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
State of North Carolina
Gaston County

MICHAEL JOHNSON,	]
	]
Plaintiff,	]
	]
vs.	]
	]
DOCTORS ASSOCIATES, INC., et al.	]
	]
Defendants.	]

AMENDED ORDER

Pursuant to Rule 60 (a) of the North Carolina Rules of Civil Procedure, the May 3, 1994 Order entered in the captioned matter is hereby amended as follows:

1. Paragraph 5 of the Findings of Fact (beginning on page 1 of the Order) is stricken and is replaced with the following:

> 5. The Defendants Doctors Associates, Frederick DeLuca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj and North Carolina Subway Group, Inc., have filed Motions to Dismiss for failure to state a claim and, in the alternative, Motions to Stay the

Proceedings pending completion of arbitration proceedings;

2. Paragraph 7 of the Findings of Fact (page 2 of the Order) is stricken and is replaced with the following:

7. After the hearing, the Court ordered the parties to file supplemental briefs and affidavits on the issue of whether Plaintiff waived his right to litigate by participating in arbitration;

3. The final paragraph of the Order is stricken and is replaced with the following:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motions brought by all moving Defendants Doctors Associates, Inc., Frederick Deluca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj and North Carolina Subway Group, Inc., -- to dismiss or to stay these proceedings on the grounds that Plaintiff has waived his right to litigate the issues that are the subject of this action by participation in the arbitration are denied.

4. The May 3, 1994 order shall remain the same in all other respects.

This the 17th day of May, 1994.

S/_____
JOHN MULL GARDNER
Superior Court Judge Presiding

U.S. DISTRICT COURT
District of Connecticut (New Haven)

Doctor's Associates v. Johnson Filed 5/18/94

Cause: 09:1 U.S. Arbitration Act

DOCTOR'S ASSOCIATES, INC.

Plaintiff

v.

MICHAEL JOHNSON

Defendant

Proceedings include all events.

5/18/94 1 MOTION by Doctor's Associates to Compel Arbitration Filing Fee

$120.00 Receipt #129204 (paz)

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
State of North Carolina
Gaston County

MICHAEL JOHNSON,	:
	:
Plaintiff.	:
	:
vs.	:
	:
DOCTORS ASSOCIATES, INC., et al.	:
	:
Defendants.	:

NOTICE OF APPEAL

NOW COME Defendants, Doctors Associates, Inc., Frederick Deluca, Peter Buck, and Franchise World Headquarters, Inc., and hereby give Notice of Appeal to the North Carolina Court of Appeals, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure; this Appeal is taken from three (3) Orders entered by Superior Court Judge Gardner, presiding in Gaston County, North Carolina, as follows:

1. Order dated May 3, 1994, denying said Defendants' Motions to Dismiss or Stay these proceedings pending Arbitration;

2. Amended Order dated May 18, 1994; and

3. Order dated May 18, 1994, denying these Defendants' Rule 12 (b) (6) Motion to Dismiss.

THIS the 25th day of May, 1994.

SIGNATURES

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT

State of Illinois
Madison County

JULIE SHINO, et al.,	) Cause No. 93-L-1293
and	)
LOUIS LEONNEKE,	)
et al.,	) Cause No. 93-L-1294
and	)
ALVARO GUERERO,	)
et al.,	) Cause No. 93-L-1295
and	)
WESAM S. YOUMARAN	) Cause No. 93-L-1296
et al..,	)
and	)
JOSE ALBERTO	)
BRENES,	) Cause No. 93-L-1297
and	)
EMILY DISTAJO,	)
et al.,	) Cause No. 94-L-155
and	)
RONALD & PATRICIA	) Cause No. 94-L-799
ROTHMUND,	)
and	)
JOHN S . PAPALEO,	)
et al.,	) Cause No. 94-L-765
	)
Plaintiffs,	)
	) (Consolidated for
vs.	) pre-trial motion
	) purposes)
DOCTOR'S ASSOCIATES,	)
INC., et al.,	)
	) FILED 10/24/94
Defendants.	)

JUDGMENT

The Court being advised in the premises, the Motion of the Plaintiffs, in all eight cases, for Partial Summary Judgment on Count VI of the Complaints as amended in the first six cases, and Count II of the Complaints in the last two cases listed above, to declare the arbitration clauses in the franchise agreements void and unenforceable, is heard and granted.

Partial Summary Judgment is entered in favor of the Plaintiffs, in all eight cases, and against the Defendants. The Court declares the arbitration clauses in the franchise agreements at issue, in all eight cases, to be void and unenforceable and judgment on that issue is entered in favor of the Plaintiffs and against the Defendants.

The Court finds that Doctor's Associates, Inc. waived the right to enforce the arbitration clauses in the *Youmaran, Guerrero, Brenes, Distajo, Rothmund* and *Papaleo* cases by filing eviction lawsuits against those Plaintiffs in the name of Subway Sandwich Shops, Inc. or Subway Restaurants, Inc., subleasing companies which were dominated and controlled by Doctor's Associates, Inc.

These eviction lawsuits alleged breaches of the franchise agreements by the franchisees-sub-lessees, Youmaran, Guerrero, Brenes, Distajo, Rothmund and Papaleo. In the Rothmund eviction lawsuit Subway Restaurants, Inc. obtained a judgment for possession and $4,061.87 in damages.

The act of filing these eviction lawsuits was an act of Doctor's Associates, Inc. by which Doctor's Associates, Inc. waived its right to compel arbitration under the arbitration clauses in the franchise agreements with respect to the Plaintiffs in these six cases. *Yates v. Doctor's Associates, Inc.*, 193 Ill. App. 3d

431, 549 N.E. 2d 1010 (Ill. App. 1990). *St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Co., Inc.*, 969 F. 2d 585 (7th Cir. 1992).

The Court further finds that all Defendants in the first six cases have waived the right to compel arbitration by seeking a litigation advantage in the cases now before the Court by moving for a change of venue, unsuccessfully, and by thereafter moving to dismiss the complaints, or in the alternative, to transfer these cases to Cook County, IL under the doctrine of forum non conveniens. The Court has also denied that motion. These defendants have appealed that ruling to the Illinois Court of Appeals, where it is now pending. Prior to moving to dismiss or transfer for lack of venue and prior to moving to dismiss or transfer under the forum non conveniens doctrine, these Defendants withdrew their motion, before this Court, to stay this litigation pending arbitration, before the Court could rule on that motion. The Court finds that these Defendants have therefore voluntarily participated in this litigation, after withdrawing their Motion to Stay Pending Arbitration, and that these Defendants have attempted to obtain a litigation advantage by such participation. As a result, these Defendants have waived their right to compel arbitration.

The Court further finds that the arbitration clauses in the franchise agreements in all eight cases are unenforceable because they lack mutuality. The arbitration clauses provide that arbitration is a condition precedent to litigation by either party. Doctor's Associates, Inc., however, is not bound by this condition, because it uses the subleasing companies which it controls and dominates to file eviction lawsuits against the franchisees, without first submitting the issue to arbitration. The subleases do not contain an arbitration clause entitling the franchisees/sub-lessees to compel arbitration, in the event an eviction lawsuit

is filed against them. Doctor's Associates, Inc. regularly attempts, initially, to resolve its disputes against its franchisees by filing eviction lawsuits, in the name of its subleasing companies, without first resorting to arbitration. As a result, the arbitration clauses in the franchise agreements lack mutuality because, while such clauses are binding on the franchisees, they are not binding on Doctor's Associates, Inc., which can employ its totally controlled and dominated subleasing companies to file eviction lawsuits against the franchisees and sublessees to resolve disputes arising under the franchise agreement. Since the arbitration clauses in the franchise agreements, including the provision that arbitration is a condition precedent to litigation, are not binding on Doctor's Associates, Inc., they are not mutually enforceable, and therefore are unenforceable by Doctor's Associates, Inc. *Hull v. Norcom, Inc.*, 750 F. 2d 1147 (11th Cir. 1985). *Matterhorn, Inc. v. NCR Corp.*, 763 F. 2d 866 (7th Cir. 1985).

The Court further finds that the arbitration clauses in the franchise agreements in all eight cases are unenforceable because they are unconscionable, in that the arbitration clauses require arbitration in Connecticut, of a dispute between Illinois residents and franchisees and Doctor's Associates, Inc., a Florida corporation which maintains its principal office and place of business in Florida. *Miller v. AAACon Auto Transport, Inc.*, 434 F. Supp. 40 (S.D. Fla. 1977), affirmed 614 F. 2d 292 (5th Cir. 1980), cert. denied, 101 S. Ct. 315, 449 U.S. 918, 63 L. Ed. 2d 1945 (1980), *AAACon Auto Transport v. State Farm Mutual Ins.*, 537 F. 2d 648 (2nd Cir. 1976), cert. denied, 429 U.S. 1042, 97 S. Ct. 742, 50 L. Ed. 2d 754 (1977); *Aluminum Products Distributors, Inc. v. AAACon Auto Transport, Inc.*, 404 F. Supp. 1374 (W.D. Okla. 1975); *Patterson v. ITT Consumer Financial Corp.*, 1B Cal. Rptr. 2nd 563,

14 Cal. App. 4 th 1659 (Cal. App. 1st Dist. 1993); *Bell v. Congress Mortg. Co., Inc.*, 30 Cal. Rptr. 2nd 205 (Cal. App. 1st Dist. 1994); *Broemmer v. Abortion Services of Phoenix*, 840 P. 2d 1013 (Ariz. 1992); *Obstetrics and Gynecologists v. Pepper*, 693 P.2d 1259 (Nov. 1985).

The Court finds that these contractual defenses to the enforcement of the arbitration clauses are equally valid under the Federal Arbitration Act, 9 U.S.C. §1 et seq and under the Illinois Arbitration Act, 710 ILCS §5/1 et seq, and therefore, this Court does not need to determine whether the Federal Arbitration Act or the Illinois Arbitration Act is the controlling act with respect to the issue now before the Court.

The Court further finds that there are no genuine material issues of fact in dispute with respect to these issues concerning the enforceability of the arbitration clauses in the franchise agreements, and that the Plaintiffs, in all eight cases, are entitled to prevail as a matter of law; partial summary judgment is therefore entered in favor of the Plaintiffs in all eight cases pursuant to Illinois Supreme Court Rule 192 and 735 ILCS § 5/2-1005.

The Court further finds that only Doctor's Associates, Inc., among the Defendants, in these eight cases, is a party to the franchise agreements containing the arbitration clauses. To the extent any of the other Defendants claim a right, or may claim a right, to compel arbitration, or to stay litigation pending arbitration, those Defendants are not entitled to enforce the arbitration clauses for the same reasons that Doctor's Associates, Inc. is not entitled to enforce the arbitration clauses and further, because these Defendants are not parties to the agreements containing the arbitration clauses.

The Court further finds that the Complainants claim the arbitration clauses in the franchise

agreements are not enforceable because the Plaintiffs were fraudulently induced into the agreements, with respect to the arbitration issue, but that this defense to arbitration has not been raised by the Motions for partial Summary Judgment, and, therefore, the Court does not consider that issue in ruling on the Motion for Partial Summary Judgment.

The Court further finds that the Defendants are entitled to file an appeal as a matter of right to this judgment under Illinois Supreme Court Rule 307.

The Court further finds that this is a final and appealable order and judgment under Illinois Supreme Court Rule 304 (a) in that there is no just reason for delaying either the enforcement of or the appeal from this judgment and order.

ENTERED this 24th day of October, 1994.

S/_____

JUDGE P.J. O'Neil

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
State of Illinois
Madison County

SANDRA BICKEL, and RAYMOND BICKEL,	)	
Plaintiffs,	)	FILED 2/7/95
v.	)	DEFAULT JUDGMENT
DOCTOR'S ASSOCIATES, INC., et. al,	)	94-L-1428
Defendants.	)	

DEFAULT JUDGMENT

Pursuant to Plaintiffs' Motion for Default Judgment, Default Judgment is hereby entered in favor of Plaintiffs and against Defendants Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. as follows:

1. On Count I judgment by default is entered against Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. and in favor of Plaintiffs on the issue of liability. A damage hearing against these two Defendants is set for the 4th day of April, 1995.

2. On Count II judgment by default is entered against Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. and in favor of Plaintiffs on the issue of liability. A damage hearing against these two Defendants is set for the 4th day of April, 1995.

3. On Count III judgment by default is entered against Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. and in favor of Plaintiffs on the issue of liability. A damage hearing against these two Defendants is set for the 4th day of April, 1995.

4. Default judgment is also entered in favor of Plaintiffs and against Defendants Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. on Count IV for a declaratory judgment, and the Court finds that based upon the evidence adduced in support of the Motion for Default Judgment, with respect to Count IV, that the arbitration clause is void and unenforceable because the Franchise Agreement lacks mutuality, because the Franchise Agreement requiring arbitration in Connecticut, between the Plaintiffs, Illinois franchisees, and Doctor's Associates, Inc., a Florida franchisor, is unconscionable: the arbitration clause is also unenforceable because it is a contract of adhesion, and does not meet the reasonable expectations of the parties, as required by Restatement of Contracts, Second, §211. The Court further finds that the Mutual Release required by Doctor's Associates, Inc. to be executed by the Plaintiffs as a condition for the sale of their franchise and store is void because such mandatory condition was not disclosed to the Bickels in the Offering Circular and related documents as required by the Illinois Franchise Disclosure Act, 815 ILCS 705/1, and because such non-disclosure is an unlawful and unfair trade practice in violation of the Illinois Consumer Protective Act, 815 ILCS §505/1, and because such Mutual Release was obtained by duress and cohesion, in that the Bickels were required to sign such a release as a condition for being permitted to sell their store and franchise. The Court finds that the arbitration clause is void

and unenforceable and that the Mutual Release executed by the Bickels as a condition for selling their store and franchise is void and unenforceable.

5. This default judgment against Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. on all four Counts of the Complaint is hereby declared to be a final and appealable judgment pursuant to Illinois Supreme Court Rule 304 (a), in that the Court finds that there is no just reason for delaying either the enforcement or the appeal from this judgment, or both.

Entered this 7th day of February, 1995.

S/Judge Phillip J. Kardis

IN THE CIRCUIT COURT FOR
THE THIRD JUDICIAL CIRCUIT
State of Illinois
Madison County

SANDRA BICKEL and RAYMOND BICKEL	)	
	)	FILED 12/6/95
Plaintiffs,	)	
	)	Cause No.
v.	)	94-L-1428
	)	
DOCTOR'S ASSOCIATES, INC., et al	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT
ORDER

The Court being advised in the premises, the motions of Edward Wood Dunham, Kevin Kennedy and Wiggin & Dana for leave to enter their appearance pro hac vice for all Defendants is heard and granted.

The motion of Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. to set aside the default judgment of February 7, 1995, having been previously briefed, and having been previously orally argued on April 4, 1995, is heard and overruled.

Pursuant to the oral motion of the Plaintiffs, the claim for punitive damages against Defendants Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. is hereby severed from the remaining claims against those Defendants, for determination at a later date.

JUDGMENT

The default judgment of February 7, 1995 scheduled a damage hearing for April 4, 1995. The affidavit of Sandra Bickel established that Plaintiffs suffered actual damages in the sum of $400,000.00. Defendants Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. offered no contrary evidence. While the preliminary injunction issued by the United States District Court for Connecticut previously enjoined the Plaintiffs from persecuting their claims against any of the Defendants in this case, it did not enjoin either Doctor's Associates, Inc. or Subway Development of Chicagoland, Inc. The Court has been advised that the preliminary injunction issued by the United States District Court for the district of Connecticut has been reversed by the United States Court of Appeals for the Second Circuit in appeal number 95-7183 in an opinion issued on or about September 12, 1995. The Court has further been advised that the appellate Court judgment reversing the preliminary injunction is now final in that the United States Court of Appeals for the Second Circuit will very soon issue its mandate to the United States District Court for Connecticut.

This Court, being advised that the Plaintiffs are no longer enjoined from proceeding with their claims against any of the Defendants in this case, including Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc., hereby enters judgment in favor of Plaintiffs, Sandra Bickel and Raymond Bickel and against Defendants, Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc., jointly and severally, for actual damages, in the sum of $400,000.00, plus Court costs.

This Court has severed the claim for punitive damages against Defendants Doctor's Associates, Inc.

and Subway Development of Chicagoland, Inc. for determination at a later date, as set forth in the order above.

This judgment is hereby declared to be a final and appealable judgment to Illinois Supreme Court Rule 304(a) in that the Court finds that there is no just reason for delaying either the enforcement or the appeal from this judgment, or both.

Entered this 6th day of December, 1995.

S/ _____

Judge

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL DISTRICT

MADISON COUNTY, ILLINOIS

MIKE (MUSHTAQ) KANCHWALA, ANVER KANCHWALA, and AZIM HEMANI,	)	
Plaintiffs,	)	Cause No. 95-L-1291
v.	)	
DOCTOR'S ASSOCIATES, INC., et al.	)	FILED 10/13/95
Defendants.	)	

JUDGMENT

The Court being advised in the premises, the motion of Plaintiffs for Summary Judgment that the arbitration clause is void and unenforceable is heard and granted.

Summary Judgment is entered in favor of Plaintiffs and against Defendants, Doctor's Associates, Inc., Frederick A. Deluca, Peter H. Buck and Subway Restaurants, Inc.

The Court declares the arbitration clauses in the franchise agreement at issue to be void and unenforceable and judgment on that issue is entered in favor of the Plaintiffs and against Defendants, Doctor's Associates, Inc., Frederick A. Deluca, Peter H. Buck and Subway Restaurants, Inc.

Some of the same issues were before the Madison County Circuit Court in the eight consolidated cases, for

pre-trial motion purposes, Julie Shino, et al. v. Doctor's Associates, Inc., et al., Cause No. 93-L-1293, and were before the Court in Bickel v. Doctor's Associates, Inc., et al., Cause No. 94-L-1428, and were also before the Court in Stuart, et al. v. Doctor's Associates, Inc., et al., Madison County, Illinois, Cause No. 95-L-1050.

For the same reasons that formed the basis for the Madison County, Illinois Circuit Court judgments of October 24, 1994 in Julie Shino, et al. v. Doctor's Associates, Inc., Madison County, Illinois Cause No. 93-L-1293, and for the same reasons for the default judgment of the Madison County, Illinois Circuit Court on Count IV for declaratory judgment in Madison County, Illinois Cause No. 95-L-1428, and for the same reasons for the entry of summary judgment in favor of the Plaintiff, franchisees by the Madison County, Illinois Circuit Court in Cause No. 95-L-1050, and for the reasons set forth in the Motion for Summary Judgment in the instant case, as supported by the Affidavit and attached Exhibits, the Court finds that the arbitration clause in the franchise agreements is unenforceable because it lacks mutuality.

The Court further finds that Doctor's Associates, Inc. waived its right to compel arbitration by filing an eviction lawsuit in the name of its leasing company, Subway Restaurants, Inc., and obtaining a judgment against the Plaintiffs here, in Will County, Illinois, for damages, possession and attorneys fees claimed under the franchise agreement between the Plaintiffs here and Doctor's Associates, Inc.

The Illinois Court of appeals has previously held that such eviction lawsuits waive the right of Doctor's Associates, Inc. to compel arbitration. Yates v. Doctor's Associates, Inc., 193 Ill. App. 3d 431, 549 N.E. 2d 1010 (Ill. App. 1990); St. Mary's Medical Center of

Evansville, Inc. v. Disco Aluminum Products Co., Inc., 969 F. 2d 585 (7th Cir. 1992).

The Court further finds that the arbitration clause is unenforceable because it is unconscionable and because it fails to meet the reasonable expectations of the parties as required by the principles of Restatement of Contracts, Second § 211, in that Doctor's Associates, Inc. reserves the right to file lawsuits against its franchisees, in the name of its alter-ego/agent leasing companies, such as Subway Restaurants, Inc. to resolve claims of Doctor's Associates, Inc. against the franchisees arising out of the franchise agreement, while requiring the franchisees to arbitrate their related claims before the American Arbitration Association in Connecticut. Miller v. AAACon Auto Transport, Inc., 434 F. Supp. 40 (S.D. Fla. 1977), affirmed 614 F. 2d 292 (5th Cir. 1980), cert. denied, 101 S. Ct. 315, 449 U.S. 918, 63 L. Ed. 2d 1945 (1980); AAACon Auto Transport v. State Farm Mutual Ins., 537 F. 2d 268 (2nd Cir. 1976), cert. denied, 429 U.S. 1042, 97 S. Ct. 742, 50 L. Ed. 2d 754 (1977); Aluminum Products Distributors, Inc. v. AAACon Auto Transport, Inc., 404 F. Supp. 1374 (W.D. Okla. 1975); Patterson v. ITT Consumer Financial Corp., 18 Cal. Rptr. 2d 563, 14 Cal. App. 4th 1659 (Cal. App. 1st Dist. 1993); Bell v. Congress Mortg. Co., Inc., 30 Cal. Rptr. 2d 205 (Cal. App. 1st Dist. 1994); Broemmer v. Abortion Services of Phoenix, 840 P. 2d 1013 (Ariz. 1992); Obstetrics and Gynecologists v. Pepper, 693 P. 2d 1259 (Nev. 1985); Graham Oil Co. v. Arco Products Co., 43 F. 3d 1244 (9th Cir. 1994) and Prudential Ins. Co. of America v. Lai, 42 F. 3d 1299 (9th Cir. 1994).

The finds that the arbitration clause lacks mutuality under the principles of Hull v. Norcom, Inc., 750 F. 2d 1147 (11th Cir. 1985); Matterhorn, Inc. v. NCR Corp., 763 F. 2d 866 (7th Cir. 1985).

The Court finds that there are no genuine material issues of fact and dispute with respect to these issues concerning the enforceability of the arbitration clauses in the franchise agreement and that Plaintiffs are entitled to prevail as a matter of law. Summary Judgment is therefore entered in favor of the Plaintiffs and against the Defendants, Doctor's Associates, Inc., Frederick A. Deluca, Peter H. Buck and Subway Restaurants, Inc. on Count I of the complaint for a declaratory judgment that the arbitration clause is void and unenforceable, pursuant to Illinois Supreme Court Rule 192 and 735 ILCS § 5/2-1005.

The Court further declares that this is a final and appealable order and judgment under Illinois Supreme Court Rule 304 (a) in that there is no just reason for denying either the enforcement of or the appeal from this judgment and order, or both.

ENTERED this 13th day of October, 1995.

S/_____

Judge A.A. Matoesian

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC.	:	
Plaintiff,	:	
v.	:	CASE NO: 394CV00349PCD
EMILY DISTAJO, et al.	:	(Consolidated Actions)
Defendants.	:	

DOCTOR'S ASSOCIATES, INC.	:	
Plaintiff,	:	
v.	:	CASE NO. 395CV00120PCD
RAYMOND and SANDRA BICKEL,	:	December 5, 1995
Defendants.	:	

MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Fed. R. Civ. P. 65 and based on the supporting memorandum of law filed herewith, plaintiff Doctor's Associates, Inc. ("DAI") hereby moves for a temporary restraining order to enjoin defendants from prosecuting or in any way advancing their state court lawsuits.

PLAINTIFF
DOCTOR'S ASSOCIATES, INC.

By_____
Edward Wood Dunham
Hand Written Endorsement

Granted, December 5, 1995
Judge Dorsey
Filed December 5, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Filed Jan. 3, 1996

DOCTOR'S ASSOCIATES, INC. Plaintiff,	:	
	:	Civil No.
vs.	:	3:94CV00349PCD
	:	
EMILY DISTAJO, ET AL. Defendants.	:	(Consolidated Actions)

RULING ON MOTION FOR
PRELIMINARY INJUNCTION

Plaintiff Doctor's Associates, Inc. ("DAI") is the national franchisor of Subway Sandwich Shops, and defendants are Subway franchisees. The parties entered into standard franchise agreements, which required arbitration of all contractual disputes in Bridgeport, Connecticut, under Connecticut law. When contractual disputes did arise, the franchisees sought judgments against DAI in numerous state courts around the country. DAI has petitioned this court to compel arbitration of the franchise disputes pursuant to 9 U.S.C. § 4. DAI presently seeks an injunction of the franchisees' state court actions until the arbitration question is decided by this court in these seventeen consolidated cases.

I. DISCUSSION

A. Likelihood of Success on the Merits, Irreparable Harm, Balance of Hardships

The franchisees oppose DAI's motion on a number of grounds that have been considered in previous decisions, the substance of which will not be repeated at length. DAI has satisfied the standard for issuance of

a preliminary injunction by demonstrating a likelihood of success on the merits and irreparable harm should the injunction not be granted. *See Toy Mfrs. Of Am., Inc. v. Blumenthal,* 806 F. Supp. 336, 340 (D. Conn. 1992), *aff'd,* 986 F. 2d 615 (2d Cir. 1993). If DAI must continue to litigate in multiple state courts, its costs will be substantial and non-recoverable. Further, DAI will face difficulty in conducting its business if courts in different states render inconsistent judgments and so not apply the franchise agreement uniformly.[1]

On the other hand, the franchisees will lose nothing if an injunction is granted, except the opportunity to argue their cases in state court at the present time. In fact, the franchisees would gain from an injunction because each of them could proceed in a single forum, rather than incurring the time and expense of dual litigation in federal and state court. Thus, the equities tip decidedly in favor of granting the relief requested.

B. Anti-Injunction Act

Under normal circumstances, the foregoing would end the discussion. In the instant matter, however, the relief sought is governed by the Anti-Injunction Act, 28 U.S.C. § 2283.[2] The Anti-Injunction Act forbids federal

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[1] DAI may never enjoy a perfectly uniform application of the franchise agreement: arbitration has not been required for the franchisee John McCrary, *Doctor's Assoc., Inc. v. Distajo,* 66 F. 3d 438, 447-49 (2d Cir. 1995), but may yet be compelled for other franchisees. *See id.* At 458 (vacating injunction and remanding issues for consideration). Although perfect uniformity may, at this stage, be unobtainable, DAI still has a strong interest in having the arbitration question resolved as to the remaining franchisees in a consistent manner.

[2] Also relevant is the policy favoring "rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 23 (1983).

courts from staying state court proceedings, subject to exceptions that are narrow and are not to be enlarged by loose statutory construction. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988); *see also Atl. Coast Line R.R. Co. v. Bhd. Of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970).

1. *Necessary in Aid of Federal Jurisdiction*

One exception to the Anti-Injunction Act permits a federal court to stay state court proceedings when "necessary in aid of its injunction." 28 U.S.C. § 2283 (1994). In *Standard Microsystems Corporation v. Texas Instruments Incorporated*, 916 F. 2d 58 (2d Cir. 1990), the Second Circuit cited *In re Baldwin-United Corporation*, 770 F. 2d 328, 337 (2d Cir. 1985), for the proposition that the "necessary in aid of" exception encompasses "circumstances...where a federal court is on the verge of settling a complex matter, and state court proceedings may undermine its ability to achieve that objective..." 916 F. 2d at 60. In *Baldwin*, the Second Circuit upheld an injunction because the district court was about to approve a settlement that was threatened by parallel state court litigation. 770 F. 2d at 337. *See also James v. Bellotti*, 733 F. 2d 989, 993-94 (1st Cir. 1984) (provisional settlement would support a protective injunction).

These cases are instructive. Although this Court is not on the verge of approving a settlement, it is on the verge of resolving this matter. Only two issues remanded by the Court of Appeals remain to be decided. *See Doctor's Assocs., Inc.*, 66 F. 3d at 458 (fraud in inducing the franchise agreement and waiver of the right to arbitrate). These issues will be heard on

February 5, 1996, after completion of discovery, and will thereafter be decided promptly.[3]

Also instructive is the principle that the "necessary in aid of" exception "is meant 'to give sufficient flexibility that a federal Court, as a Court of equity, may...deal adequately with the situation at hand.'" *James*, 733 F. 2d at 993 (quoting 1A MOORE'S FEDERAL PRACTICE ¶ 0.208a [2] at 2336 (citation omitted)). In light of this consideration, numerous factors favor enjoining the franchisees' state court actions:

> The parties, lawyers, and witnesses could be spared great time and expense if the arbitration question is litigated in a single forum, rather than in numerous proceedings across the country. DAI has thousands of franchisees, and the franchisees have pressed their disputes in courts in at least five different states, including Alabama, Illinois, Massachusetts, North Carolina, and Pennsylvania. Judicial resources could be conserved by avoiding duplicative consideration by numerous judges of the same issues. Judicial economy could also be served because this Court has already

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[3] Indeed, it seems that it will be eminently possible to decide these issues quickly given that, in a number of the consolidated cases, DAI has represented, without contradiction by the franchisees, that there is no factual foundation for the remaining defenses. (Of course, discovery remains to be completed, and the issues have not been finally briefed for determination).

acquired substantial familiarity with the issues presented, having had jurisdiction over these and related disputes for over eighteen months. Comity between federal and state Courts could be preserved by avoiding conflicting judgments. At least one state Court has shown a willingness to decide an issue in a manner contrary to a previously rendered federal judgment. *Compare Kanchwala v. Doctor's Assocs., Inc.*, No. 95-L-1291 (Cir. Ct. 3d Jud. Dist., Madison County Ill. filed Oct 13, 1995) at 2 ("[T]he arbitration clause in the franchise agreements is unenforceable because it lacks mutuality.") *with Doctor's Assocs., Inc.*, 66 F. 3d at 458 ("We affirm the district Court's holding that 'mutuality' was not at issue...[W]here consideration supports a contract as a whole, an arbitration clause in that contract in not void for lack of consideration.") (decided Sept. 12, 1995). The arbitration agreement expresses the parties' interest in resolving franchise disputes in a single forum. Enjoining multiple state Court proceedings will best preserve this interest in a single forum. Although it is presumed that the state courts are equally competent to resolve the issues presented, DAI has asserted, without contradiction by the

> franchisees, that the state courts have rushed to judgment without allowing the parties adequate time for discovery or other trial preparation.

The foregoing demonstrates that this is an instance where injunctive relief is "necessary to prevent...state court[s] from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atl. Coast Line R.R. Co.*, 398 U.S. at 295 (dicta); *see also In re Corrugated Container Antitrust Litig.*, 659 F. 2d 1332, 1334-35 (5th Cir. 1981) (citing *Atlantic Coast Line* where a "complicated antitrust action...required a great deal of the district court's time...[and a state court's actions] would clearly [have] interfere[d] with the multidistrict court's ability to dispose of the broader action pending before it"), *cert. denied sub nom. Three J Farms, Inc. v. Pls.' Steering Comm.*, 456 U.S. 936 (1982).

2. Necessary to Protect or Effectuate Federal Judgment

Another exception to the Anti-Injunction Act permits a federal court to stay state court proceedings when "necessary...to protect or effectuate its judgments." 28 U.S.C. § 2283 (1994). This exception is commonly known as the "relitigation" exception because it permits enjoining state litigation of an issue that was previously presented to and decided by the federal court. *See Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F. 2d 556, 565, (2d Cir. 1991), *cert. denied*, 501 U.S. 1218 (1991).

The "relitigation" exception does not authorize enjoining state litigation of issues on which the federal court's decision was reversed. *Woods Exploration & Producing Co. v. Aluminum Co. Of Am.*, 438 F. 2d

1286, 1315 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1991). Because the Court of Appeals rejected this court's determination of the waiver and fraud issues, *Doctor's Assocs., Inc.*, 66 F. 3d at 458, the "relitigation" exception is not a basis for enjoining state litigation of these questions.

The "relitigation" exception, however, does authorize enjoining state litigation of issues on which the federal court's judgment was affirmed. *See Cowgill v. Raymark Indus., Inc.*, 832 F. 2d 798, 802 (3d Cir. 1987) ("When a court of appeals reverses a judgment and remands for further consideration of a particular issue, leaving other determinations of the trial court intact, the unreversed determinations continue to work an estoppel.") (discussing law of the case and collateral estoppel); *see also Huguley v. Gen. Motors Corp.*, 999 F. 2d 142, 145 (6th Cir. 1993) ("The relitigation exception is grounded in principles of res judicate and collateral estoppel.").[4] Because the Court of Appeals affirmed this Court's determination of the "mutuality" question, *Doctor's Assocs., Inc.*, 66 F. 3d at 458, the "relitigation" exception authorizes an injunction of state court proceedings on this issue.

Unlike the "necessary in aid of" exception, therefore, the "relitigation" exception is not a basis for enjoining state litigation of *all* of the issues involved in this matter. Nevertheless, the "relitigation" exception does offer further indication that a critical aspect of the requested injunction is permissible.

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[4] The principle of estoppel is further illustrated by *In re Necchi Sewing Machine Corporation*, 260 F. Supp. 665 (S.D.N.Y. 1966). In Necchi, the district Court enjoined state Court proceedings to "'protect' and 'effectuate'" its determination that the disputed issues were referable to arbitration. *Id.* at 669.

II. CONCLUSION

For the reasons stated, injunctive relief is proper and is not barred by the Anti-Injunctive Act. Accordingly, plaintiff's motion for preliminary injunction (doc. 164-1) is granted. Defendants, their agents, representatives, attorneys, and any one acting on their behalf are hereby enjoined, until further order of this Court, from commencing, prosecuting, or in any way acting in (1) any action related to or arising under any franchise agreement with Plaintiff and/or (2) any matter or dispute which is or may be subject to any arbitration clause in any such agreement. For reasons articulated in previous decisions, Plaintiff will not be required to post a bond.

SO ORDERED.

Dated at New Haven, Connecticut, January 2, 1996.

S/Peter C. Dorsey
Chief United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC.,	:	Civil No. 3:94CV00349PCD
Plaintiff,	:	(Consolidated
v.	:	Actions)
EMILY DISTAJO, ET AL.,	:	Filed Feb. 14, 1996
Defendants.	:	

RULING ON MOTION TO FOREGO TRIAL AND GRANT JUDGMENT AS A MATTER OF LAW

Plaintiff Doctor's Associates, Inc. ("DAI") is the national franchisor of Subway sandwich shops, and defendants are Subway franchisees. The parties entered into standard franchise agreements, which required arbitration of all contractual disputes in Bridgeport, Connecticut, under Connecticut law. When contractual disputes did arise, the franchisees sought judgments against DAI in numerous state courts around the country. DAI has petitioned this court to compel arbitration of the franchise disputes pursuant to section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4. The franchisees have opposed the petition on grounds including fraudulent inducement and waiver of the right to arbitration, which issues were remanded by the Second Circuit for determination by this court. *See Doctor's Assocs., Inc. v. Distajo*, 66 F. 3d 438, 458 (2d Cir. 1995). A trial on the franchisees' arbitration defenses is scheduled to begin on February 20, 1996.

I. DISCUSSION

1. Treating Petition to Compel Arbitration as Motion for Summary Judgment

DAI moves for the Court to forego trial and render judgment as a matter of law. In support of this request, DAI relies principally on two Second Circuit cases construing FAA § 4: *Manning v. Energy Conversion Devices, Inc.*, 833 F. 2d 1096 (2d Cir. 1987), and *Oppenheimer & Company, Inc. v. Neidhardt*, 56 F. 3d 352 (2d Cir. 1995). In *Manning*, the Second Circuit affirmed a district court's order compelling arbitration and held that there was no need for an evidentiary hearing on a fraudulent inducement defense when no affidavits had been offered in support thereof. 833 F. 2d at 1103. "A party resisting arbitration...must submit sufficient evidentiary facts in support of [its] claim in order to precipitate the trial contemplated by 9 U.S.C. § 4." *Id.* Moreover, "[a]rbitration is intended to be a process for the swift resolution of disputes, and parties endeavoring to resist arbitration must alert district courts promptly and fully to whatever claims they may have in opposition to arbitration and the evidentiary basis of such claims." *Id.*

In *Oppenheimer*, the Second Circuit affirmed a district court's order compelling arbitration and held that trial was unnecessary when no evidence had been offered in support of defendants' objection to arbitration. 56 F. 3d at 357-58. "If the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried." *Id.* at 358.

Manning and *Oppenheimer* suggest that § 4 petitions to compel arbitration should be treated as motions for summary judgment. Such a procedure is

also suggested by decisions from other jurisdictions which have explicitly applied summary judgment principles to § 4 petitions. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F. 2d 51, 54 n.9 (3d Cir. 1980); *Matterhorn, Inc. v. NCR Corp.*, 727 F. 2d 629, 632 (7th Cir. 1984). Accordingly, DAI's petition will be treated as a motion for summary judgment on the issues that remain to be adjudicated: the franchisees' defenses of waiver and fraudulent inducement, and the demand for abstention as to Raymond and Sandra Bickel.

2. Waiver of Right to Arbitration

The franchisees argue that DAI has waived its right to arbitration by pursuing eviction lawsuits against them through alter ego leasing companies. The Second Circuit has noted that the franchisees' waiver defense requires this Court to determine three issues. *See Doctor's Assocs., Inc.*, 66 F. 3d at 456-57. The first two issues do not require trial because they are not in dispute: DAI has conceded that the leasing companies were its alter egos and that the eviction proceedings were based on the cross-default provisions of the franchisees' subleases. *See Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F. 2d 1191, 1196 (7th Cir. 1987). ("If the arbitrability of the parties' dispute involves no questions or only legal questions, a jury trial would be pointless because its outcome could not affect the judge's decision on whether to order arbitration."). The third issue -- whether the franchisees suffered prejudice from the eviction actions also does not seem to involve any material factual disputes. *See, e.g., Cotton v. Slone*, 4 F. 3d 176, 179 (2d Cir. 1993) ("Sufficient prejudice to infer waiver has been found when a party seeking to compel arbitration engages in discovery procedures not available in arbitration, makes motions going to the merits of an adversary's claims, or delays invoking arbitration rights

while the adversary incurs unnecessary delay or expense.") (citations omitted). Nevertheless, the Court will not decide this issue as a matter of law until the parties have briefed it according to the schedule specified below.

3. Fraudulent Inducement

The franchisees argue that the franchise agreements were fraudulently induced because: (1) DAI misrepresented that arbitration is a condition precedent to litigation of franchise disputes, and (2) DAI failed to disclose that it regularly pursues eviction lawsuits through the alter ego leasing companies without first engaging in arbitration. The franchisees have not produced sufficient evidence to avoid summary judgment on the issue of fraudulent inducement. The only evidence suggesting that the alleged misrepresentation and nondisclosure actually occurred is contained in the February 12, 1996 affidavit of the franchisees' attorney, David M. Duree. (*See* Duree Aff. 4.) Duree's recitation of what DAI did and did not say in discussions with the franchisees would be inadmissible at trial as hearsay. *See* FED. R. EVID. 802. Inadmissible evidence may not be considered in connection with a motion for summary judgment. *See, e.g., Fowler v. Smith,* 68 F. 3d 124, 126 (5th Cir. 1995). Accordingly, DAI is entitled to judgment, as a matter of law, on the franchisees' defense of fraudulent inducement.

4. Abstention as to Raymond and Sandra Bickel

The franchisees Raymond and Sandra Bickel argue that this Court should abstain from exercising jurisdiction over DAI's claims against them in light of a related decision in Illinois state court. *See Bickel v. Subway Sandwich Shops, Inc.,* No. 94-L-1428, slip op. at 2 (Cir. Ct., 3d J. Cir., Madison County, Ill. Dec. 5,

1995). This issue does not appear to involve any material factual disputes. Nevertheless, the Court will not decide this issue as a matter of law until the parties have briefed it according to the schedule specified below.

5. Franchisees' Right to Jury Trial

The franchisees argue that judgment as a matter of law deprives them of their right to jury trial. This claim is without merit. It is well-established that absent genuine issues of material fact, summary judgment decides only questions of law and does not deny the losing party's right to jury trial. *See, e.g., Benjamin v. Traffic Executive Ass'n E. R.R.*, 869 F. 2d 107, 115 n.11 (2d Cir. 1989).

II. CONCLUSION

DAI's motion to forego trial and render judgment as a matter of law (docs. 181-1, 181-2) is granted. The trial schedule to begin on February 20, 1996 is canceled. DAI is granted judgment, as a matter of law, on the franchisees' defense of fraudulent inducement. The Court will decide the remaining issues as a matter of law after the parties brief the aforementioned issues of prejudice and abstention. The franchisees shall file a memorandum of law addressing these issues on or before February 21, 1996, and DAI shall file a memorandum in response on or before February 28, 1996.

SO ORDERED.

Dated at New Haven, Connecticut, February 14, 1996.

S/Peter C. Dorsey
Chief United States
District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC.,	:	
	:	Civil No.
Plaintiff,	:	3:94CV00349PCD
	:	
v.	:	(Consolidated
	:	Actions)
EMILY DISTAJO, ET AL.,	:	
	:	Filed
Defendants.	:	March 14, 1996

RULING ON DEFENDANTS' MOTION TO SET ASIDE FEBRUARY 14, 1996 ORDER AND SCHEDULE TRIAL

Plaintiff Doctor's Associates, Inc. ("DAI") is the national franchisor of Subway sandwich shops, and defendants are Subway franchisees. The parties entered into standard franchise agreements, which required arbitration of all contractual disputes in Bridgeport, Connecticut. When contractual disputes did arise, the franchisees sought judgments against DAI in numerous state courts around the country.

DAI has petitioned this Court to compel arbitration of the franchise disputes pursuant to section 4 of the Federal Arbitration Act, 9 U.S.C. § 4. As defenses to arbitration, the franchisees have argued that DAI fraudulently induced their agreement to arbitrate and waived its right to arbitration. These issues were remanded by the Second Circuit for determination by this Court. *See Doctor's Assocs., Inc. v. Distajo*, 66 F. 3d 438, 458 (2d Cir. 1995).

After the franchisees demanded a jury trial, and trial was scheduled to begin on February 20, 1996, DAI sought to forego trial and obtain judgment as a matter of law. On February 14, 1996, DAI's motion was granted: trial was canceled, DAI was granted judgment as a matter of law on the issue of fraud, and the Court agreed to decide the remaining issues, as a matter of law, after further briefing. The franchisees move to set aside that ruling and reschedule trial.

I. DISCUSSION

A. Reconsideration of the Franchisees' Demand for a Jury Trial

As suggested in the February 14 ruling, the franchisees cannot force a jury trial simply by demanding one.[1] "A party resisting arbitration...must submit sufficient evidentiary facts in support of [his] claim to precipitate the trial contemplated by 9 U.S.C. § 4." *Manning v. Energy Conversion Devices, Inc.*, 833 F. 2d 1096, 1103 (2d Cir. 1987). He must show that, if proven, his allegations would relieve any obligation to arbitrate, and he must produce some evidence to substantiate his factual allegations. *Dillard v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 961 F. 2d 1148, 1154 (5th Cir. 1992), *cert. denied sub nom. Dillard v. Sec. Pac. Corp.*, 506 U.S. 1079 (1993). Furthermore, he must do so "promptly." *Manning*, 833 F. 2d at 1103.

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[1] Defendants have blithely assumed that their jury demand was sufficient by itself, although they should have known otherwise from a related state court decision. *See Suslovic v. Subway Real Estate Corporation*, No. 1768 of 1993, slip op. At 3 (Ct. Of Common Pleas, Beaver County, Pa Jan. 17, 1996) ("Plaintiffs have made no averments of fact to support the conclusory allegation of fraud. . .The trial Court is under no obligation to schedule a hearing in order to permit plaintiffs to prove that which they have not alleged.") (citation omitted).

Until affidavits were filed in recent weeks, the franchisees offered no substantiation of their fraud and waiver claims. They insist that they were not afforded sufficient time to come forward with evidence, on the ground that DAI's motion for judgment as a matter of law was not served at least ten days before trial, as was required given that the February 14 ruling treated DAI's motion as one for summary judgment. *See* FED. R. CIV. P. 56(c). In fact, the February 14 ruling conferred Rule 56 status not on DAI's motion to forego trial, but on DAI's petitions to compel arbitration. These were served between approximately March 8, 1994 and September 8, 1995, allowing each franchisee anywhere from five to twenty-three months to come forward with evidence before the eventual trial date. The franchisees' failure to do so until the very end of this protracted period clearly undermines their demand for a jury trial, as the Second Circuit has apparently regarded a delay of even a few weeks to be too great. *See Manning*, 833 F. 2d at 1103.

B. The Franchisees' Affidavits

Although belated, the franchisees' affidavits will be considered in relation to their defenses, along with the parties' compliance with the January 24, 1996 Trial Preparation Order. Affidavits of the following franchisees have been offered: Michael Johnson, Emily Distajo, Jose Brenes, Alvaro Guerrero, Sandra Bickel, Linda (Youmaran) Boudaghian, Louis Loenneke, Julie Shino, Gregory Kane, John Papaleo, Michael Kanchwala, Donald A. Stuart, Ronald Rothmund, and Bruno Giannini.

The affidavits are essentially identical, distinguished only by limited details of personal dealings with DAI or its affiliates. Each affidavit recites the following:

a. Before signing the franchise agreement, the franchisee was provided an offering circular;

b. The franchisee signed a form franchise agreement with DAI;

c. The franchise agreement provided that all disputes between DAI and the franchisee were to be arbitrated;

d. The franchise agreement stated that arbitration was a condition precedent to litigation by any party;

e. The representation in d) was false;

f. The falsity, per e), was not known by the franchisee when the franchise agreement was signed but is known now;

g. The franchisee did not know that lessors of the franchisee's business premises were alter egos of DAI or that they routinely initiated eviction lawsuits to resolve claims under the franchise agreement;

h. If g) had been known, the franchisee would not have signed the franchise agreement;

i. The franchisee relied on c) and d);

j. When signing the franchise agreement, the franchisee was not aware that the leasing companies had no assets, employees, income, or offices. Had this been known, the franchise agreement would not have been signed; and

k. DAI used eviction, actual or threatened, as leverage to force correction of alleged franchise agreement defaults.

Some franchisees also assert that:

a. Charges related to evictions were deducted from franchisees' deposit accounts;

b. Complaints to DAI about eviction and franchise agreement enforcement went unanswered

c. Some stores were sold/lost in the face of eviction;

d. Suits resulted from agreements to sell that were reached in the face of eviction; and/or

e. One franchisee was evicted by the landowner at DAI's instance.

C. *The Offering Circular and Franchise and Lease Agreements*

The franchise agreement and/or offering circular provide:

a. The franchisee acknowledges receipt of the offering circular ten days in advance of signing the franchise agreement;

b. "Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association...The commencement of arbitration proceedings to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of a legal action by either party...."; and

c. "Other than the representation contained in this Agreement and advertising materials of the Franchisor, no other representations have been made to or relied on by the Franchisee...."

Each franchisee, in addition to executing a franchise agreement, executed a lease for the property in which the store was to be operated. The lessor was a leasing company associated with DAI. The offering circular notes the prospect of another corporation being the lessor and includes a sample sublease which flags the right of a lessor to seek eviction in the event of non-compliance with the franchise agreement or with the lease. There are no arbitration clauses in the leases.

The franchisees have not asserted that any information was provided by DAI, or anyone acting on its behalf, on which any franchisee relied in agreeing to the arbitration clause, other than the franchise agreement and the offering circular. There is no evidence that DAI concealed any material fact or refused any request by any franchisee for information about either the franchise agreement or the lease.

D. The Franchisees' Defenses

1. Fraud

The franchisees argue that they were induced to agree to arbitration by fraud on the part of DAI. "[I]f the 'arbitration clause was induced by fraud, there can be no arbitration....'" *Distajo,* 66 F. 3d at 457. Under Connecticut law,[2] [1] the elements of fraud are "(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury." *Miller v. Appleby,* 183 Conn. 51, 54-55, 438 A. 2d 811, 813 (1981). "Fraud is not to be presumed but must be proven by clear and satisfactory evidence." *Id.* at 55, 438 A. 2d at 813. The issue is not

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[2] Most franchise agreements designate Connecticut law as controlling. Some cite Florida or Illinois law. DAI claims, without contradiction, that Florida and Illinois law does not differ.

whether DAI acted improperly in failing to arbitrate before resorting to litigation. If DAI failed to take steps required to resolve disputes with franchisees, there are remedies by which they may enforce their rights and DAI's obligations. To prevail on their defense, the franchisees must present evidence from which it could be found that they were induced by fraud to agree to arbitration.

The evidence is that the franchisees received the offering circular describing the transaction and the documents which accomplished it, the franchise agreement and the lease. For the ten days required by 16 C.F.R. § 436.1 *et seq.*, they had the opportunity to review the franchise agreement and consult with whomever they wished. They signed the franchise agreement and the lease with no evidence they were under any stress in doing so. They do not claim to have asked questions which were not answered. There is no claim of a representation other than what the franchise and the lease provided. The franchisees claim the representation that arbitration was a condition precedent to litigation was false and thus fraudulent. Arbitration is so stated as a provision of the franchise agreement. It is stated not as a fact but as a requirement of the franchise agreement. Even if it is regarded as an undertaking by DAI, it has not been shown to be false. There is no evidence that DAI had any intention, at the time of execution of the franchise agreements, to act in enforcement of its rights and the franchisees' obligations, other than in conformity with the lawful remedies available to it under the law.

At most, the evidence might show that the franchisees did not understand, or more likely did not consider, the possibility when the franchise agreement was signed, that franchise agreement duties might be enforced by eviction proceedings undertaken pursuant to the leases providing: "[i]f...Sublessee shall default in

the performance of any of the terms, covenants or conditions of the aforesaid Franchise Agreement...Sublessor, at its option, may terminate this lease on ten (10) days written notice to Sublessee, and upon such termination, Sublessee shall quit and surrender the leased premises...." Clearly compliance with the franchise agreement was interrelated with the entitlement to continued occupancy of the subleasehold. That evidence is insufficient to sustain the franchisees' claim. At most, they lacked understanding of the ramifications of two documents which they had ample opportunity to read and understand. In signing them, they are presumed to have read what was available to be read. They cannot hold DAI as misrepresenting what is plainly stated in the documents nor the legal ramifications thereof. If they did not understand what the documents plainly provide, their lack of understanding could not have resulted from misrepresentation, concealment, or misleading on the part of DAI. If the franchisees truly did not understand that eviction as provided by the lease could be used to enforce franchise agreement obligations, that lack of understanding could only have been the result of their failure to read the leases and franchise agreements, their failure to think through and thus consider DAI's possible courses of action to enforce the franchise agreements or their failure to consult and seek clarification of anything they did not understand. No omission or conduct of DAI is claimed or shown to have caused the franchisees' lack of knowledge.

It cannot be found that the franchisees' have offered evidence from which it could be found that they were fraudulently induced by DAI to agree to the arbitration clause. The clause which described arbitration as a condition precedent to litigation is not, as a matter of law, a misrepresentation. Defendants thus make an argument without factual substantiation. There is no

reason why they did not know, when they executed the franchise agreement, with the arbitration clause, what they claim to know now. Nor is there any reason why they could not have known then what they claim to know. What was in the lease and the franchise agreement was plainly available for them to have read and understood or to have been clarified had they wished. DAI neither precluded them from reading what was in each document nor comprehending what is plainly there stated. One cannot fail "to inquire about the ramifications of [an arbitration] clause to avoid the obvious consequences of an agreed-to arbitration." *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F. 2d 334, 339 (7th Cir. 1984). The franchisees cannot claim that DAI failed to explain an ambiguous contract because there is no ambiguity. Absent ambiguity, there can be no liability for failure to explain the meaning of a contract. *See Rush v. Oppenheimer & Co., Inc.*, 681 F. Supp. 1045, 1053-55 (S.D.N.Y. 1988); *Bender v. Smith, Barney, Harris Upham & Co., Inc.*, 789 F. Supp. 155, 158-59 (D.N.J. 1992).

After consideration of what the franchisees have now made part of the record, it is found that they have not offered evidence from which it could be found that there was a misrepresentation, know by DAI to be false, which was made to induce them to agree to arbitration. Accordingly, the franchisees' defense of fraud does not present a triable issue.

2. Waiver

The elements of waiver are that an eviction was initiated by DAI based on a franchise agreement default and its cross-default provision and that prejudice was caused to a franchisee in relation to the claim now in litigation. *See Distajo*, 66 F. 3d at 457. DAI concedes responsibility for the eviction, resolving the alter ego and control questions. Doubt as to defenses to

arbitration, such as waiver, are to be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S.1, 24-25 (1983). This is consistent with promotion of arbitration as the parties' chosen method of resolving disputes. *See Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F. 3d 20, 25 (2nd Cir. 1995). Arbitration's favored status creates a presumption against waiver. *Kramer v. Hammond*, 943 F. 2d 176, 179 (2d Cir. 1991); *Lawrence v. Comprehensive Business Servs.*, 833 F. 2d 1159, 1165 (5th Cir. 1987).

a. Franchisees Who Were Not Subject to Eviction Proceedings

The following franchisees have not been subject to any eviction action and therefore cannot claim waiver: Raymond and Sandra Bickel, Michael Johnson, Gregory Kane, Louis Loenneke and Mary Ann Bookout, Julie and Johnson Shino, and Leylah and Albert Yonan.

Kane makes no allegation of eviction by DAI. He asserts an eviction by his "Landlord" unrelated to DAI. He claims the landlord was requested to do so by DAI with no reflection of any foundation for the claim - - i.e., the source of his assertion. His claim of a defense fails for two reasons. The eviction is not shown to have been based on a default under a franchise agreement, and could not be where brought by an unrelated landlord under a lease which is not shown to have a cross-default clause with the franchisee. Secondly, the eviction was not done by an alter ego under DAI control and thus could not have prejudiced Kane as the issues there litigated are not shown to have any relation to the issues between Kane and DAI. There is no substantiation for his claim of waiver.

Johnson, Loenneke, and Julie Shino allege not eviction, but only threats of eviction which forced them to make payments of amounts owed. Shino claims

threats to collect eviction fees which are not shown to be franchise agreement obligations. Payments made under threat of eviction are not a basis for waiver absent an eviction, the prosecution of which constitutes "litigation of substantial issues going to the merits." *Sweater Bee by Bariff, Ltd, v. Manhattan Indus., Inc.*, 754 F. 2d 457, 461 (2d Cir. 1985), *cert. denied*, 474 U.S. 819 (1985). Thus there is no evidence that "DAI did litigate substantial issues going to the merits" and that "the franchisees suffered prejudice from the eviction proceedings." *Doctor's Assocs.*, 66 F. 3d at 457. These franchisees cannot have been forced to litigate issues in eviction proceedings when there were no such proceedings. They were not prejudiced thereby. Johnson, Kane, Loenneke and Bookout, Yonan and the Bickels and Shinos have not offered evidence from which it could be found that their defense of waiver is valid and thus no issue is presented for determination by a trier of fact.

b. Franchisees Who Were Subject to Eviction Proceedings

i. Background

Alvaro and Maria Guerrero. In the summer of 1992, an eviction was brought and dismissed against the Guerreros after they reached "an agreement with respect to the claimed unpaid royalties" and fees. In July 1993, another eviction action was brought for the same royalties and fees. The Guerreros made no claim for arbitration. The action was dismissed as the sublessor was not registered to do business in the state. There was no adjudication of the merits. There is no claim by the Guerreros that royalties or fees were not owed to DAI.

Wesam and Linda Youmaran. An eviction was commenced against the Youmarans, who did not seek arbitration of the claimed royalties and fees. A

judgment of possession and indebtedness entered. The Youmarans paid and were permitted to retain possession and sell the franchise. They have not claimed that royalties or fees were not owed to DAI.

Emily and Renato Distajo, and Constantino and Milo Lamando. An eviction was brought against the Distajos and Lamandos, who were co-franchisees. Unpaid royalties and fees were alleged. They made no claim for arbitration. The case was dismissed in three weeks for want of registration by the sublessor in the state. There was no adjudication of the substantive claims. These franchisees do not claim there that royalties or fees were not owed to DAI.

John Papaleo. An eviction action was commenced against Papaleo, who did not dispute unpaid royalties and advertising fees under the franchise agreement. He claimed that he was unable to pay them. He abandoned the store and the franchise, whereupon the eviction was dismissed. No adjudication of the disputes occurred. Arbitration was not claimed.

Jose Brenes. Evictions were initiated against Jose Brenes who operated two locations. Fees under the franchise agreements were claimed. Arbitration was not claimed by Brenes. While the first eviction was pending, the lease was not renewed by the sublessor. Brenes was required to pay the rent due under the lease. Thus the sublessor was not required to preserve the property for him. That location was lost. There is no evidence of an adjudication of the substantive claims pertaining to that location. At the second location, eviction was ordered but before it was executed Brenes surrendered the property.

Ronald and Patricia Rothmund. An eviction was brought against the Rothmunds based on unpaid royalties and fees under the franchise agreement for which judgment was entered. The Rothmunds have not

disputed unpaid amounts due. They were "unaware of the eviction lawsuit or the judgment against [sic] that time." DAI refused to negotiate the payment offered toward the amount claimed, and the store was padlocked.

Michael and Anver Kanchwala, and Azim Hemani. The eviction action against the Kanchwalas and Hemani is claimed by DAI to have been based solely on unpaid rent. It supports its contention by an affidavit, its letter to the franchisees of January 6, 1995, and the complaint in the eviction action. Michael Kanchwala concedes that the eviction claimed unpaid rent under the sublease but adds that attorneys' fees were claimed under the franchise agreement. By Kanchwala's own affidavit, however, the eviction action was brought by a leasing company which was not a party to the franchise agreement. It was impossible, therefore, for the Court to award fees based thereupon. Thus, Kanchwala's assertion that attorneys' fees were claimed under the franchise agreement cannot be credited and will not be deemed to create an issue for a trier of fact.

Bruno Giannini. An eviction action was brought against Giannini, who did not seek arbitration and did not dispute the amount alleged to be owed. He asserts he had difficulty paying royalties on time. The action was dismissed as the sublessor was not registered to do business in the state. No substantive disputes were adjudicated.

ii. Discussion

The substantive disputes between these franchisees and DAI are twofold. The first group of disputes arise from the franchise agreement in the form of royalties and fees that defendants do not dispute are provided for in the franchise agreement. There is no evidence from which it could be found that these were improper bases

for the eviction actions, nor is it claimed that no amount had accrued to DAI's credit.

The second group of disputes are defendants' complaints of DAI's conduct in bringing about the franchise agreements and in dealing with franchisees in relation to the operation of the franchises. These were asserted in the state Court claims which prompted DAI's petitions to compel arbitration.

Only if the eviction actions claimed noncompliance with the franchise agreements and prejudiced the franchisees by forcing litigation of arbitrable claims will waiver will lie as a defense to arbitration. Litigation involving claims that were not arbitrable does not constitute waiver of the right to arbitration. *Lawrence*, 833 F. 2d at 1165. "Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party." *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F. 2d 494, 496 (5th Cir. 1986). As to franchisees subjected to eviction actions, it must be considered whether DAI delayed requesting arbitration of the claims presented and that the eviction proceedings prejudiced the franchisees' claims. *See Ank Shipping Co. of Greece v. Seychelles Nat'l Commodity Co., Ltd.*, 596 F. Supp. 1455, 1458 (S.D.N.Y. 1984).

The eviction action against the franchisees Kanchwala and Hemani was not based on any claim arising under the franchise agreement. Their claim of waiver cannot be found to be substantiated by any evidence.

The eviction actions against the franchisees Distajo, Yonan, and Giannini were dismissed as their sublessor was not registered in the state and thus could not maintain the action. No substantive claims were adjudicated therein and the franchisees were not prejudiced. "[F]iling of an action[] is not a waiver of the

right to arbitrate, at least not before the defendant has answered on the merits...." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos,* 553 F. 2d 842, 845 (2d Cir. 1977). Their claim of waiver is not substantiated.

The first eviction action against Guerrero was settled and dismissed. The second action was dismissed as the sublessor was not registered in the state and could not maintain the action. For the same reasons noted with respect to Distajo, Yonan, and Giannini, Guerrero cannot be found to have sustained his claim of waiver.

The eviction action against Papaleo was dismissed after he abandoned the store. There is no evidence to suggest that the process was substantial or that any adjudication of his rights actually occurred. As he walked away from the premises, and the franchise, there appears to be no evidence of prejudice and his claim of waiver thus could not be found to be sustained.

The eviction action against the Youmarans resulted in a judgment but they settled the claim of unpaid royalties and fees, retained the location, and subsequently sold the business. That evidence would not suggest they suffered any prejudice with respect to the claims involved in their claims against DAI and thus would not sustain their claim of waiver.

The Rothmunds had no knowledge of the action until they were notified they were about to be locked out. They were evicted.

The first premises subleased to Brenes were lost when the sublessor, who claimed nonpayment of rent, did not renew the lease. The record clearly reflects that Brenes was obliged for the rent under the lease. The eviction pertaining to that property is not shown to have prejudiced him as the loss of the property, and his

rights under the sublease, were not the responsibility of DAI or his sublessor. The eviction pertaining to his second location did result in a Court order ousting him of possession. That was accomplished by his surrender of the property. The eviction actions, and in particular those against Brenes and the Rothmunds, asserted amounts due under the franchise agreements and the leases. None of the proceedings are suggested to have been extensive, nor have the results been suggested as in any way impairing the claims the franchisees asserted in their state court actions concerning which DAI has requested arbitration. What the franchisees have claimed in those actions they are fully able to present in arbitration or in court, whichever forum they are found entitled to. There has been no delay to the franchisees with respect to the claims asserted in state court other than the delay in their efforts to avoid arbitration. DAI, promptly after each state court action was commenced, petitioned for an order compelling arbitration. The eviction actions claimed remedies on the basis of defaults by the franchisees in obligations allegedly created by the franchise agreements and/or subleases. The franchisees have not disputed the obligations or the defaults except some disputes as to the amounts accrued. What they have challenged is the propriety of DAI and the sublessors reserving the right to those remedies and procedures in the franchise agreements and subleases and the propriety of the conduct of the sublessors, DAI, and DAI's associates other than the sublessors (who were not involved in the eviction actions). In short, the disputes involved in the eviction actions are not the same as the disputes involved in the franchisees' state court actions which DAI has sought to resolve in arbitration.

The franchisees note expense incurred in the eviction cases, of limited magnitude, *see Distajo,* 66 F. 3d at 4557, but suggest no identity of the issues in those

cases, even those in which judgments entered, and the issues in the matters DAI seeks to arbitrate. The cases are clear, and *Distajo* confirms, to have waived the right to arbitration. The party seeking arbitration must substantially invoke the judicial process to resolve the issues claimed for arbitration. In *Distajo,* Judge Cabranes cites *Cotton v. Slone*, 4 F. 3d 176 (2d Cir. 1993), and *Com-Tech Associates v. Computer Associates International, Inc.*, 938 F. 2d 1574 (2d Cir. 1991), in which prejudice was found where the party seeking arbitration "fully litigated *arbitrable* issues on the merits" or "forced plaintiffs to litigate *arbitrable* claims, and caused considerable expense and delay" with respect to the precise issues sought to be placed in arbitration. *Distajo*, 66 F. 3d at 447 (emphasis added). That is not the case here. *See Gingiss Int'l, Inc. v. Bormet,* 58 F. 3d 328, 332 (7th Cir. 1995) (no waiver in bringing an eviction action on a separate sublease "because that action involved different issues" than those being arbitrated); *McMahon v. Shearson/Am. Express, Inc.*, 618 F. Supp. 384, 387 (S.D.N.Y. 1985), *aff'd in part and rev'd on other grounds,* 788 F. 2d 94 (2d Cir. 1986), *rev'd on other grounds,* 482 U.S. 220 (1987).

The franchisees never sought to arbitrate the claims now at issue, consistent with their vigorous efforts in these actions to avoid arbitration. Their claims of prejudice are less telling when the only delay in obtaining a determination of the disputes is not the result of the eviction actions but of the attempts here to avoid arbitration. The issues that the franchisees asserted in state court were not raised in any of the eviction actions. When they were raised in state court, DAI immediately petitioned for orders to compel their arbitration. The franchisees argue that threats of use of eviction, and charges of franchisees' accounts with eviction-related activities, qualify as grounds for

finding prejudice. They cite no authority for the proposition, and the argument flies in the face of the cases discussed above, which clearly base waiver on substantial resort to the courts to litigate arbitrable disputes. Threats are not a basis for finding waiver. *Romnes v. Bache & Co.*, 439 F. Supp. 833, 839 (W.D. Wis. 1977). The franchisees assert prejudice but offer no analysis or demonstration of how prejudice occurred. Each eviction action but one was concluded prior to commencement of each franchisee's state court action. The Distajo eviction was dismissed several days after the state court action was commenced. A concluded eviction action could hardly have delayed or prejudiced a defendant who later sought to litigate different issues.

3. Abstention

The franchisees Raymond and Sandra Bickel argue that this Court should abstain from compelling them to arbitrate because of a related, December 6, 1995 judgment in their favor in Illinois state court. This Court's February 14 ruling noted that the Bickels have not objected to this conclusion.

The Bickels' abstention claim is just a slightly modified version of the res judicata/collateral estoppel argument that this Court and the Second Circuit have previously rejected. *See Distajo*, 66 F. 3d at 449-50. When disposing of the earlier defense, the Second Circuit noted that an Illinois judgment is not entitled to preclusive effect until the "the potential for appellate review [has] been exhausted." *Id.* (quoting *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 113, 499 N.E. 2d 1373, 1375, 102 Ill. Dec. 360, 362 (1986)). Illinois law has not changed in the interim, and DAI's appeal of the Bickels' judgment is still pending. Accordingly, there is no basis for preclusion.

A different outcome is not warranted by the Bickels' reliance on *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1 (1983). That case counsels abstention when relatively substantial proceedings have taken place in state court. *Id.* at 22. DAI asserts, without contradiction, that the Illinois judgment was entered almost immediately and without an evidentiary hearing. Such action does not constitute relatively substantial proceedings, as meant by *Moses H. Cone,* when compared with the Second Circuit's *Distajo* ruling and this Court's plethora of decisions in these consolidated cases over the last two years.

II. CONCLUSION

For the foregoing reasons, the franchisees' motion (docs. 191-1, 191-2) is denied. The prior finding that the franchisees have not shown their entitlement to trial on the issue of fraud, and that a matter of law that defense is without merit, will stand. The franchisees have also not demonstrated the existence of a genuine issue of material fact as to their defense of waiver, which is found to be without merit as a matter of law. Further, it is found that there is no basis for abstention as to the Bickels.

Accordingly, DAI's petitions to compel arbitration are granted. The preliminary injunctions entered on November 28, 1995 and January 3, 1996 will remain in effect because they are necessary to effectuate the foregoing judgment compelling arbitration. *See, e.g., McGuire, Cornwell & Blakey v. Grider,* 765 F. Supp. 1048, 1052 (D. Colo. 1991).

The clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, March 12, 1996.

S/Peter C. Dorsey
Chief United States
District Judge

QUESTIONS PRESENTED IN THIS AND TWO OTHER PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED IN THE PETITION ARISING FROM THE FEBRUARY 24, 1997 JUDGMENT IN SECOND CIRCUIT DOCKET NO. 96-7321

I. Whether the abstention doctrine bars a federal court from enjoining further prosecution of a state case in which a judgment for $400,000.00 has been entered, an appeal bond posted and appeal filed, while ordering arbitration of the same claim previously determined by the state judgment?

II. Whether the Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal courts to relitigate state judgments holding the arbitration clauses void and unenforceable and awarding $400,000.00 in damages if the federal actions were filed before the state judgments were entered?

III. Whether the Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal courts to relitigate the issues and claims previously determined by the North Carolina state court which refused to enforce the arbitration clause, if the Connecticut federal action was filed after the state rulings and raised issues inextricably intertwined with the state rulings: i.e., the validity and enforceability of the arbitration clause?

QUESTIONS PRESENTED IN THE PETITION ARISING FROM THE FEBRUARY 24, 1997 JUDGMENT IN SECOND CIRCUIT

DOCKET NO. 96-7011

I. Whether a federal court may enjoin in personam proceedings in a state court which has concurrent jurisdiction over the same claim, to insure federal determination of that claim?

II. Whether the federal courts may avoid appellate scrutiny of a federal injunction of state proceedings, issued in violation of 28 U.S.C. §2283 to preserve the case for federal determination, by entering a subsequent judgment and another injunction to effectuate it, made possible by the earlier, offending injunction?

QUESTIONS PRESENTED IN THE PETITION ARISING FROM THE JUNE 10, 1997 JUDGMENT IN SECOND CIRCUIT

DOCKET NO. 96-9141

I. Whether state law or federal common law determines the waiver defense to enforceability of a contract to arbitrate?

II. If federal common law determines the waiver defense, whether prejudice to the non-waiving party is an element of the defense?

(2)

Supreme Court, U.S.
FILED
SEP 23 1997
CLERK

No. 97-146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EMILY DISTAJO, RENATO DISTAJO, CONSTANTINO LAMANDO, MILO LAMANDO, JOSE ALBERTO BRENES, ALVARO GUERRERO, MARIA GUERRERO, WESAM YOUMARAN, LINDA YOUMARAN, LOUIS LOENNECKE, MARY ANN BOOKOUT, MICHAEL JOHNSON, RONALD ROTHMUND, PATRICIA ROTHMUND, JOHN PAPALEO, J.S.P., INC., RAYMOND BICKEL, SANDRA BICKEL, MUSHTAG KANCHWALA, ANVER KANCHWALA and AZIM HEMANI,

Petitioners,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

1. Did the Second Circuit correctly conclude, based on the particular facts of this case, that the District Court did not abuse its discretion in declining to abstain from deciding respondent's petitions to compel arbitration under the Federal Arbitration Act in light of the extensive proceedings regarding respondent's petitions that had occurred in the District Court for over two years and given that the case was before the court on remand from the Second Circuit with instructions directing the District Court to decide petitioners' two remaining defenses to arbitration?

2. Did the Second Circuit correctly conclude, based on the unique procedural history of this case, that the *Rooker-Feldman* doctrine did not deprive the District Court of subject matter jurisdiction to decide respondent's petitions to compel arbitration?

STATEMENT PURSUANT TO RULE 29.6

Doctor's Associates, Inc. states that it has no parent company and no subsidiaries (other than wholly-owned subsidiaries).

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No. 97-146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EMILY DISTAJO, RENATO DISTAJO, CONSTANTINO LAMANDO, MILO LAMANDO, JOSE ALBERTO BRENES, ALVARO GUERRERO, MARIA GUERRERO, WESAM YOUMARAN, LINDA YOUMARAN, LOUIS LOENNECKE, MARY ANN BOOKOUT, MICHAEL JOHNSON, RONALD ROTHMUND, PATRICIA ROTHMUND, JOHN PAPALEO, J.S.P., INC., RAYMOND BICKEL, SANDRA BICKEL, MUSHTAG KANCHWALA, ANVER KANCHWALA and AZIM HEMANI,

Petitioners,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is one in a series of appeals to the United States Court of Appeals for the Second Circuit and this Court by certain Subway sandwich shop franchisees seeking to avoid their contractual obligation to arbitrate their claims against

respondent Doctor's Associates, Inc. ("DAI"). *See, e.g., Doctor's Associates, Inc. v. Riggs*, No. 96-9141 (2d Cir. June 10, 1997), *cert. pending*, No. 97-141; *Doctor's Associates, Inc. v. Distajo, et al.*, No. 96-7011 (2d Cir. Feb. 24, 1997), *cert. pending*, No. 97-145; *Doctor's Associates, Inc. v. Jabush, et al.*, 89 F.3d 109 (2d Cir. 1996); *Doctor's Associates, Inc. v. Stuart, et al.*, 85 F.3d 975 (2d Cir. 1996); *Doctor's Associates, Inc. v. Distajo, et al.*, 66 F.3d 438 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1352 (1996) ("*Distajo I*"). *See also Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996). As the Second Circuit observed in its opinion below, "[w]e are not the first panel of this court to encounter an appeal by groups of Subway franchisees, represented by attorney David M. Duree, involving similar -- if not identical -- facts and legal issues regarding arbitration of disputes with DAI." *Doctor's Associates, Inc. v. Distajo, et al.*, 107 F.3d 126, 127 (2d Cir. 1997) ("*Distajo II*").

DAI is the national franchisor of Subway sandwich shops. Petitioners are present or former Subway franchisees who sued DAI in state court and then refused to arbitrate their claims when DAI demanded arbitration in accordance with the standard arbitration clause in the franchise agreement.[1]

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[1] The standard arbitration clause provides substantially as follows:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. Each party will be responsible for their own costs in conjunction with the arbitration proceeding. If Franchisee commences action in any court prior to an arbitrator's final decision on the controversy or claim, then the Franchisee will be responsible for all expenses incurred by the Company and Franchisee in the arbitration and the court proceedings.

This Petition arises from petitioners' steadfast refusal to comply with their contractual obligation to arbitrate their disputes with DAI, and DAI's efforts to enforce those arbitration agreements under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. (the "FAA").

1. As the Second Circuit observed below, "[s]ome explanation of the tangled proceedings" in these cases is necessary to an understanding of the issues posed by petitioners' refusal to comply with the terms of their arbitration agreements. *Distajo II,* 107 F.3d at 137. The events giving rise to these cases began with the filing of state court lawsuits by Subway franchisees. In December 1993, a group of Subway franchisees filed lawsuits in the Circuit Court of Madison County, Illinois, against DAI, its owners, agents and affiliates.[2] Petitioner Michael Johnson filed his lawsuit in North Carolina state court on April 8, 1993. Prior to filing suit, Mr. Johnson had been actively participating in arbitration with DAI. After petitioners' counsel filed suit on behalf of Mr. Johnson in state court, Mr. Johnson refused to take any further part in the arbitration.

In response to each of the Illinois and North Carolina state court actions, DAI promptly filed a demand for arbitration with the American Arbitration Association ("AAA"). When each franchisee refused to comply with DAI's arbitration demand, DAI filed separate petitions in the United States District Court for the District of Connecticut to compel

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[2] Counsel for these franchisees and for petitioners here later filed three more lawsuits on behalf of Subway franchisees against DAI and others in the Madison County Circuit Court during the spring and summer of 1994. To say that all of the Illinois petitioners were "forum-shopping" in filing suit in Madison County would be an understatement: each petitioner in those actions works in metropolitan Chicago, which is about 300 miles away from Madison County; the only Illinois parties in those cases are from the Chicago area; and none of the facts of any of the cases has the slightest connection to Madison County. *See Distajo I*, 66 F.3d at 441.

arbitration under Section 4 of the FAA, 9 U.S.C. § 4.[3] The District Court eventually consolidated those petitions and others (a total of sixteen) under the caption *Doctor's Associates, Inc. v. Distajo, et al.*

From the outset, petitioners' strategy was to delay resolution of DAI's Section 4 petitions for as long as possible, in order to seek rulings on arbitrability favorable to petitioners from the state courts before the District Court could compel arbitration.[4] For example, petitioners filed over 20 briefs in the District Court setting forth a series of tenuous arguments challenging the court's authority to hear the case. As a result of petitioners' dilatory tactics, the parties were forced to brief the same issues more than ten times. Petitioners' counsel frankly admitted during a hearing in the Madison County court that the Illinois petitioners were in a "race to the courthouse" and wanted to obtain a ruling from the state court that the Illinois actions were not arbitrable before the District

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[3] Because a petition to compel under Section 4 may be brought only in the federal district with jurisdiction over the contractually designated site of arbitration and because petitioners' franchise agreement with DAI calls for arbitration in Bridgeport, the District of Connecticut was the only forum where DAI could properly file its petitions. *See, e.g., Merril Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995); *Snyder v. Smith*, 736 F.2d 409, 420 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Maria Victoria Naviera, S.A. v. Cementos Del Valle, S.A.*, 759 F.3d 1027, 1031 (2d Cir. 1985); *Lawn v. Franklin*, 328 F. Supp. 791, 793 (S.D.N.Y. 1971).

[4] This Court has recognized that the intent of the FAA was to provide for "rapid and unobstructed enforcement of arbitration agreements". *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983). Section 4 requires an "expeditious and summary hearing, with only restricted inquiry into factual issues", *Moses H. Cone*, 460 U.S. at 22, and contemplates a decision on arbitrability in "very short order". *Id.* at 22, 23 nn. 26 & 27. Owing to petitioners' tactics and the District Court's congested docket, however, it became impossible for the court to comply with these statutory mandates. DAI filed its first petition in March 1994, but the court was not able to issue its decision compelling arbitration until almost eight months later.

Court could compel arbitration. Respondents' Appendix ("R. App.") A-3.

In one respect, petitioners' efforts to thwart DAI's right to an expedited and summary resolution of its petitions to compel arbitration worked. For on October 24, 1994, over seven months after DAI filed its first Section 4 petition in the District Court, and about two weeks before the District Court ultimately granted those petitions, the Madison County Circuit Court ruled in the Illinois cases that the arbitration clause in the Subway franchise agreement was unenforceable. *Distajo I*, 66 F.3d at 449. DAI timely filed a motion for reconsideration, and that motion is still pending before the state court. *Id.*

The North Carolina state court also entered two orders before the District Court could rule on DAI's Section 4 petitions. R. App. A-4–A-10. In the North Carolina action, DAI had filed a motion under Section 3 of the FAA to stay the lawsuit brought by petitioner Johnson in favor of arbitration, and a separate motion to dismiss. In the motion to dismiss, DAI contended that Mr. Johnson had waived his right to challenge the arbitration agreement because he had previously participated in an arbitration with DAI. The North Carolina trial court summarily denied each of DAI's motions. However, the court did not determine whether the arbitration clause in the Subway franchise agreement was enforceable. Instead, the court held only that Mr. Johnson had not waived his right to contest the validity of the arbitration clause. R. App. A-8; *see Distajo I*, 66 F.3d at 450-51.

2. On September 29, 1994, the District Court denied each petitioner's motion to dismiss DAI's Section 4 petition. R. App. A-11–A-19. As is relevant to the Petition, the court rejected petitioners' argument that it should abstain from deciding DAI's petitions. Following this Court's decision in *Moses H. Cone*, 460 U.S. at 13-14, the District Court recognized that "only exceptional circumstances will compel a federal court to relinquish jurisdiction due to parallel proceedings in state court." R. App. A-15. The court concluded that

petitioners had "not enumerated exceptional circumstances that warrant dismissal in deference to the state court litigation." R. App. A-15.

After receiving additional briefs, the District Court granted DAI's 16 petitions to compel arbitration. *See Doctor's Associates, Inc. v. Emily Distajo, et al.*, 870 F. Supp. 34 (D.Conn. 1994). The District Court expressly rejected petitioners' claim that because the Madison County Circuit Court had decided that the arbitration clause was unenforceable, the full faith and credit statute, 28 U.S.C. § 1738, prevented the District Court from granting DAI's petitions. *Id.* at 36. The District Court concluded that under Illinois law, Illinois courts would not give preclusive effect to the state court's ruling because DAI still had the right to appeal. *Id.* Because the Illinois ruling was not "final" for *res judicata*/collateral estoppel purposes under Illinois law, it was not entitled to full faith and credit. *Id.*[5] Each petitioner then appealed to the Second Circuit.

3. Less than a month after the District Court had compelled arbitration in the 16 Distajo actions, petitioners' counsel filed yet another lawsuit on behalf of two more Chicago-area franchisees -- Sandra and Raymond Bickel -- once again in the Madison County state court. DAI promptly filed in the District Court a petition to compel arbitration pursuant to Section 4 of the FAA. Nevertheless, on the day that he received notice that the District Court had scheduled a hearing on DAI's petition and acting without any notice to DAI, petitioners' counsel moved the Madison County Circuit Court for an order of default for failure to appear against DAI. The court entered a default the same day, once again without notice to DAI. Among other things, the Madison County Circuit Court purported to hold, through the default, that the arbitration clause in the Subway franchise agreement was not

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[5] The District Court also entered an injunction enjoining petitioners from further litigation of their state court actions. The injunction was entered to effectuate the District Court's judgment compelling arbitration. *Distajo*, 870 F. Supp. at 36.

enforceable. *Distajo I*, 66 F.3d at 449. DAI timely filed a motion to set aside the default.

On February 13, 1995, the District Court granted DAI's petition to compel the Bickels to arbitrate in accordance with their arbitration agreement and issued an injunction identical to the *Distajo* injunction barring further litigation of the Bickels' state court action. *See Distajo I*, 66 F.3d at 444. The Bickels appealed the District Court's ruling, and their appeal was consolidated for oral argument with the previously pending appeal of the Distajo franchisees.

4. On September 12, 1995, the Second Circuit issued a decision upholding virtually all of the District Court's rulings. Specifically, the Second Circuit affirmed the District Court's ruling that the state court decisions did not preclude the District Court from ruling on DAI's petitions. In deciding this issue, the court recognized that "a federal court must 'give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.'" *Id.* at 446 (citations omitted). Because under Illinois law an Illinois trial court judgment is not final, and thus not entitled to preclusive effect, until all appellate rights have been exhausted, the Second Circuit held that the District Court properly concluded that it was not required to give preclusive effect to these decisions. *Id.* at 449-50.[6] The Second Circuit also affirmed the District Court's decision not to abstain. Finally, the Second Circuit remanded two issues to the District Court for additional consideration: (1) whether the arbitration

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[6] The Second Circuit also rejected petitioner Johnson's claims regarding the scope of the North Carolina state court ruling. "In North Carolina . . . collateral estoppel only precludes the relitigation of issues that were actually and necessarily decided in the earlier action." *Distajo I*, 66 F.3d at 450 (citations omitted). The Second Circuit observed that the written orders of the North Carolina court "did not explain why it denied the stay [under Section 3 of the FAA]", nor did they "make any findings of fact or conclusions of law regarding the arbitration clause." *Id.* at 450. Therefore, these rulings did not bar the District Court from compelling Mr. Johnson to arbitrate in accordance with his agreement with DAI. *Id.* at 450-51.

clause was a product of fraud; and (2) whether DAI waived its right to arbitrate the dispute of any defendant.

Petitioners filed a Petition for Writ of Certiorari seeking review of the Second Circuit's rulings regarding *res judicata*/collateral estoppel and abstention. The Court denied the Petition. *Distajo I*, 116 S. Ct. 1352 (1996).

5. After remand from the Second Circuit, petitioners resumed their tactics and rush for judgment in the state court actions. Thus, on November 17, 1995, before the Second Circuit's mandate had issued and while petitioners were still enjoined from prosecuting their state court actions,[7] the Bickels moved the Madison County court for a $400,000 judgment on the default that had previously been entered against DAI. Despite the fact that no proceedings had taken place in the Bickels' state court action since February 1994, on December 6, 1995, one day after the District Court issued a temporary restraining order barring petitioners from further litigation in the state lawsuits,[8] the Madison County court entered an order denying DAI's motion to set aside the default judgment and awarding the Bickels $400,000. Petitioners' Appendix ("Pet. App.") A-54–A-56. DAI timely appealed that judgment.

On March 14, 1996, the District Court issued its final judgment rejecting petitioners' remaining defenses to arbitration that had been remanded from the Second Circuit and granting each petition to compel arbitration. The court found as a fact that DAI had not procured the arbitration agreement by fraud and that DAI had not waived its right to compel arbitration of these disputes. The District Court also rejected the

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[7] The Second Circuit's mandate vacating the District Court's injunction did not issue until November 22, 1995.

[8] Because it was clear that petitioners intended to do everything they could to thwart the District Court's jurisdiction on remand, DAI was forced to seek a temporary restraining order preventing litigation in the state court actions until the District Court could consider the issues remanded by the Second Circuit. The District Court granted a TRO and a preliminary injunction, which is the focus of the Petition in No. 97-145.

Bickels' claim that the December 6, 1995 default judgment in their state court action required the District Court to abstain from ruling on the issues that had been remanded by the Second Circuit. As the court noted "[t]he Bickels' abstention claim is just a slightly modified version of the res judicata/collateral estoppel argument that this court and the Second Circuit have previously rejected." *Doctor's Associates, Inc. v. Distajo, et al.*, 944 F. Supp. 1010, 1022 (D.Conn. 1996), *citing Distajo I*, 66 F.3d at 449-50. Because an Illinois judgment is not entitled to preclusive effect until all appeals have been exhausted, the default judgment (which was still on appeal) was not final and did not prevent the District Court from granting DAI's petition. The District Court also rejected the Bickels' argument that the default judgment constituted "substantial proceedings" warranting abstention under this Court's ruling in *Moses H. Cone*, *supra*. As the court noted, "the Illinois judgment was entered almost immediately and without an evidentiary hearing. Such action does not constitute relatively substantial proceedings, as meant by *Moses H. Cone*, when compared with the Second Circuit's *Distajo* ruling and this court's plethora of decisions, in the consolidated case over the last two years." 944 F. Supp. at 1022-23.

6. Petitioners once again appealed to the Second Circuit, which affirmed each of the District Court's rulings. *Distajo II*, 107 F.3d at 139. With regard to the Bickels' abstention claim, the court held that the Bickels had "failed to articulate any persuasive reason why abstention would be proper in this case." *Id.* at 138. The court also affirmed the District Court's holding that the default judgment did not constitute substantial proceedings warranting abstention. *Id.*

Finally, the Second Circuit rejected petitioners' argument, raised for the first time on appeal, that the *Rooker-Feldman* doctrine, which holds that "a United States District Court has no authority to review final judgments of a state court," deprived the District Court of subject matter jurisdiction. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). The Second Circuit found that DAI was not seeking appellate review of any of the state court decisions because "DAI filed its

petitions to compel arbitration . . . before the state courts had made any rulings on the merits . . .” 107 F.3d at 138. Accordingly, the *Rooker-Feldman* doctrine had no application to this case. The court also noted that there was no legal authority for the proposition that the *Rooker-Feldman* doctrine could “deprive a district court of subject matter jurisdiction over a petition to compel arbitration under [the FAA].” *Id.* After the Second Circuit rejected petitioners’ petition for rehearing and suggestion for rehearing *en banc*, they filed this Petition.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition on each issue raised. Neither the abstention nor *Rooker-Feldman* arguments raised in the Petition present any compelling legal issues. Petitioners do not claim that the Second Circuit applied the wrong legal standard on either issue or that the Second Circuit’s decision conflicts with any decision of this Court or of other circuit courts. Rather, petitioners merely disagree with the Second Circuit’s application of settled legal doctrines to the particular facts of this case. In view of the unique facts and (in the words of the Second Circuit) “tangled proceedings” of this case, those fact-bound determinations by the Second Circuit were unquestionably correct. In any event, neither issue presents any questions that warrant this Court’s review.

I. The Second Circuit’s Affirmance of the District Court’s Decision To Exercise Its Discretion Not To Abstain Does Not Warrant Review.

This Petition arises out of an unique procedural history and involves a highly unusual set of facts. Since there is no dispute or conflict as to the correct legal principles at issue and since it is clear that petitioners’ abstention claim turns largely on the uncommon facts of these cases, there is no reason for

the Court to grant petitioners' request to review the District Court's exercise of discretion not to abstain in this case.[9]

Abstention is a narrow exception to the general rule that requires a district court to adjudicate cases properly before it. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (citations omitted). Only exceptional circumstances will justify a district court in abstaining from the exercise of this duty; and the mere pendency of a parallel state court proceeding is insufficient to warrant abstention in light of a district court's "unflagging obligation . . . to exercise the jurisdiction given [it]." *Id.* at 817. Furthermore, abstention will rarely, if ever, be appropriate in a case, such as this, involving a petition to compel arbitration under the FAA.

Thus, in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), this Court held that it was plain error for the District Court to abstain from ruling on a petition to compel arbitration despite the existence of a previously filed state court action. As this Court noted, abstention in such circumstances is contrary to the strong federal policy favoring arbitration and the FAA's intent to provide for "rapid and unobstructed enforcement of arbitration agreements." *Id.* at 22-26.

> The basic issue presented in [the] federal suit was the arbitrability of the dispute between Mercury and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or

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[9] Petitioners raised identical abstention claims in *Distajo I*, where they argued that the Illinois court judgments holding the arbitration clause unenforceable required the District Court to abstain from ruling on DAI's petitions. Both the District Court and the Second Circuit rejected this argument, R. App. A-15, *Distajo I*, 66 F.3d at 458, and this Court denied petitioners' Petition for Writ of Certiorari. *Distajo I*, 116 S. Ct. 1352 (1996). Here, petitioners make the identical claim with regard to the default judgment in the Bickel case. This Court should deny this Petition for the same reasons that it denied the Petition in *Distajo I*.

> federal court . . . [O]ur task in cases such as this is not to find some substantial reason for the **exercise** of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest justifications," that can suffice under *Colorado River* to justify the **surrender** of that jurisdiction. Although in some rare circumstances the presence of state law-issues may weigh in favor of that surrender . . . the presence of federal law issues must always be a major consideration weighing against surrender.

Id. at 24-26 (emphasis in original).

Given this Court's holding in *Moses H. Cone*, it is not surprising that petitioners do not cite a single case that conflicts with the District Court's decision to exercise jurisdiction in this case. Indeed, Petitioners do not claim that either the District Court or the Second Circuit applied the wrong legal standard in determining that abstention was inappropriate in this case. Rather, they argue only that on the particular facts of this case the default judgment obtained by the Bickels constituted "substantial proceedings" in the state court that required the courts to abstain under *Moses H. Cone*. Petition ("Pet.") 14. That fact-specific issue does not require review by this Court. Moreover, petitioners' argument is wrong for two reasons.

First, *Moses H. Cone* makes it quite clear that whether substantial proceedings have taken place in state court is only one of many factors that are relevant to a district court's exercise of discretion to abstain. *Moses H. Cone*, 460 U.S. at 19-29. Here, petitioners' arguments for abstention are directed only to the proceedings in the District Court **after** remand from the Second Circuit. Pet. 12-15. The District Court was more than justified in exercising its discretion not to abstain at that late stage of this case, regardless of the nature of the proceedings in state court, in view of the extensive proceedings that had occurred in the District Court during the nearly two years that this case was pending in that court and the fact that the case

was before that court with instructions from the Second Circuit to decide petitioners' two remaining defenses to arbitration. 460 U.S. at 22 (where federal court "had taken most of the steps necessary to a resolution of the arbitrability issue," abstention was plain error). As the Second Circuit aptly observed below, petitioners simply have not "articulated any persuasive reason why abstention would be proper in this." *Distajo II*, 107 F.3d at 138.

Second, the Second Circuit correctly determined on the basis of the factual record that the "Illinois default judgment, entered without an evidentiary hearing, does not constitute 'substantial' state proceedings warranting abstention under *Moses H. Cone*." *Id. See United States v. Johnston*, 268 U.S. 220, 227 (1925) (Court will not review fact based decisions) and *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (same). No proceedings of any substance had taken place in the Illinois court, and it issued the default judgment in contravention of the District Court's TRO, which petitioners' counsel neglected to bring to the state court's attention. *Distajo II*, 107 F.3d at 137. As the Second Court recognized, to allow the Bickels to obtain a default judgment in violation of the District Court's TRO and then use that judgment as a means to deprive the District Court of its jurisdiction to decide issues on remand would be the height of unfairness and would deprive DAI of its federal right under the FAA to "rapid and unobstructed enforcement of [its] arbitration agreement." *Moses H. Cone*, 460 U.S. at 23.[10]

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[10] Petitioners' cursory reference to *Younger* and *Pennzoil* does not support their cause. *Younger* involved abstention in deference to a parallel state criminal action and reflects this Court's recognition of a state's unique interest in enforcing and applying its criminal laws. *Younger v. Harris*, 401 U.S. 37, 45 (1971). *Pennzoil* rested in large part on this Court's interest in avoiding unnecessary constitutional litigation by first allowing a state court to rule on a plaintiff's claims. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). Neither doctrine has any relevance here. Thus, the Petition fails to present any conflict of law worthy of review.

II. The Second Circuit's Determination That The *Rooker-Feldman* Doctrine Did Not Apply To This Case Does Not Warrant Review.

The Second Circuit's ruling that the *Rooker-Feldman* doctrine did not deprive the District Court of subject matter jurisdiction over DAI's petitions to compel arbitration was based on the application of a well-settled legal doctrine to the "tangled proceedings" and unique facts of this case. Petitioners do not claim that there are any conflicts among the circuits, and it is clear that there are no compelling legal issues worthy of this Court's review.

As the Second Circuit recognized, the *Rooker-Feldman* doctrine stands for the simple and narrow proposition that federal district courts have only original jurisdiction and, therefore, do not have authority to review final judgments of state courts. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Gash Assoc. v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993). The fundamental purpose of the doctrine is to prevent federal district courts from exercising **appellate** jurisdiction over a state court judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). Accordingly, the *Rooker-Feldman* doctrine applies only if the federal court plaintiff is attacking a prior state court judgment. *Gash*, 995 F.2d at 728.

Here, the Second Circuit correctly determined that DAI's petitions to compel arbitration were not appeals from any state court judgment. As to the Illinois actions, the record is undisputed that DAI filed its petitions to compel arbitration **before** the Illinois court entered any of its judgments. Even in the case of the Bickels, the Illinois default judgment was not entered until after the District Court had entered a TRO after remand in *Distajo I. Distajo II*, 107 F.3d at 138; *see* Pet. 15. Thus, by definition, DAI's petitions did not seek review of any Illinois state court judgment. *Id.* at 137-38. *Pennzoil Co. v. Texaco, Inc.*, 784 F.2d 1133, 1144 (1986), *rev'd on other grounds*, 481 U.S. 1 (1987).

As to petitioner Johnson, the North Carolina court's denial of DAI's motions to dismiss and stay did not result in a judgment regarding the enforceability of DAI's arbitration clause. The court merely determined that Mr. Johnson had not waived his right to challenge the arbitration clause; the court made no findings of fact or conclusions of law regarding the arbitration clause itself or DAI's conduct. *Distajo I*, 66 F.3d at 450. As a result, DAI's federal court petition seeking an order compelling arbitration was not an appeal from the North Carolina court's findings and in no way attacked that decision. Nor did DAI claim to have been injured in any way by the North Carolina court's rulings. *See Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510 (7th Cir. 1996) (*Rooker-Feldman* doctrine applies where federal plaintiff alleges an injury arising out of a state court judgment).

DAI's petitions were filed pursuant to the FAA and sought enforcement of DAI's federal right to arbitrate. The District Court clearly had subject matter jurisdiction over this dispute and no subsequently entered non-final ruling by the state courts could deprive the District Court of its jurisdiction over DAI's petitions. Petitioners do not cite a single case that has applied the *Rooker-Feldman* doctrine to deprive a district court of subject matter jurisdiction over a petition to compel arbitration under the FAA. Where, as here, a party to a valid arbitration agreement has filed petitions to compel arbitration under the FAA in federal court immediately upon notice of the adverse parties' claims and **before** any state court rulings regarding the arbitration clause, the *Rooker-Feldman* doctrine has no application, and the strong federal policy favoring arbitration requires the federal court to exercise jurisdiction over the petition and enforce the arbitration agreement rapidly and without obstruction or delay. *See Moses H. Cone*, 460 U.S. at 23; *Distajo II*, 107 F.3d at 138.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent
Doctor's Associates, Inc.

Dated September 23, 1997

APPENDIX

Appendix A

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MIKE (MUSHTAQ) KANCHWALA, ANVER KANCHWALA, and AZIM HAMANI,	)	
Plaintiffs,	)	
-vs-	)	No. 95-L-1291
DOCTOR'S ASSOCIATES, INC., FREDERICK A. DELUCA, PETER H. BUCK, JOANN BACHEWICZ and SUBWAY RESTAURANTS, INC.,	)	
Defendants.	)	

REPORT OF PROCEEDINGS

HEARING ON MOTIONS

BEFORE THE HONORABLE A. A. MATOESIAN, CIRCUIT JUDGE PRESIDING

APPEARANCES:

Mr. David M. Duree
Attorney at Law
812 N. Collins, Laclede's Landing
St. Louis, Missouri 63102-2174
Appearing for Plaintiffs

Mr. Theodore J. Williams, Jr.
and
Mr. David G. Loseman
Attorneys at Law
One Metropolitan Square
St. Louis, Missouri 63102
Appearing for Defendants

DATE: October 13, 1995

Dorothy Warren, C.S.R.
Official Court Reporter
C.S.R. =084-001421

going forward with the other case. So when I said before Judge O'Neill in the summer of 1994 that it was a race to the courthouse, what I said was an accurate statement of the law. There is no question here that my clients prefer to have their rights as Illinois franchisees, which include claims under the Illinois Franchise Disclosure Act; that they prefer to have those rights decided by the courts in Illinois. It is beyond question that the franchisor, Doctor's Associates, Inc., prefers to have its rights decided by the federal court in Connecticut and/or arbitrators in Connecticut. There is no dispute about that. It is, in fact, a race to the courthouse. But there's nothing illegal, immoral, or improper about the fact that's what the law is, because we have a dual system of jurisprudence. We have the federal system. We have the state system. And we are in that area of the law where which court rules first has great significance of what the final outcome of the case will be. So I make no apologies for asking this Court to rule on my motions before this Court, before the court in Connecticut can rule on similar motions and simultaneously issue an injunction prohibiting me from going forward with this court.

THE COURT: I understand your position.

MR. WILLIAMS: But the problem is simply this. In the other cases we had a right to argue our forum motion; albeit

[end of excerpt]

Appendix B

[Filed May 3, 1994]

STATE OF NORTH CAROLINA COUNTY OF GASTON	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 93 CVS 1324

Michael Johnson,
Plaintiff,
vs
Doctor's Associates, Inc., et al
Defendants.

ORDER

FINDINGS OF FACT:

1. This action was commenced by the Plaintiff's filing a complaint seeking damages for misappropriation of funds;

2. The Plaintiff is a franchisee of several Subway Sandwich store franchises in North Carolina. Doctor's Associates is the franchisor;

3. The franchise agreement contains an arbitration clause which provides as follows:

> C. Any controversy or claim arising out of, or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the commercial arbitration of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, or whichever City in which the company is then headquartered, and judgment upon an award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of, or relating to this contract is a condition precedent to the commencement of legal action by either party.

4. In his complaint, Plaintiff alleges that the arbitration clause is void for illegality, lack of mutuality and fraud;

5. The Defendant Doctor's Associates, Inc., has filed a Motion to Dismiss for failure to state a claim and, in the alternative, a Motion to Stay the Proceedings pending completion of arbitration proceeding;

6. The hearing on these motions was held before the undersigned Judge;

7. After the hearing, the Court entered an order denying the Motion to Dismiss for failure to state a claim and ordering the parties to file supplemental briefs and affidavits on the issue of whether the Plaintiff waived his right to litigate by participating in arbitration;

Based on the evidence presented at the hearing, and as set forth in the supplemental affidavits, and after having considered the arguments of counsel, the Court makes the following additional findings of fact:

1. Doctor's Associates filed a demand for arbitration with the American Arbitration Association (AAA) on or about the 26th day of January 1993;

2. Attorney David W. Smith, III, acting on behalf of the Plaintiff, filed an answer and counterclaim on February 10, 1993, and also submitted a five hundred dollar administrative fee to the AAA;

3. In his answer the Plaintiff denied the allegations in Doctor's Associates' statement for arbitration and in his counterclaim, sought an award of damages based on his contention that an employee of Doctor's Associates had misappropriated the Plaintiff's funds. Plaintiff did not challenge the validity of the arbitration clause or object to the jurisdiction of AAA to arbitrate the parties' claims;

4. On April 7, 1993, Plaintiff filed an objection to the jurisdiction and authority of the AAA to proceed with arbitration. The basis for the objection was that the arbitration

provision in the franchise agreement was void and unenforceable because of illegality, lack of mutuality and fraud;

5. On April 14, 1993, pursuant to Rule 8 of the Commercial Arbitration Rules of the AAA, Plaintiff filed a motion with the AAA to amend its counterclaim. The motion was filed "under protest" and specifically set forth the bases on which the Plaintiff contested the jurisdiction of the AAA to arbitrate the matters. On the same date, the Plaintiff filed with the AAA a motion to appoint additional arbitrators;

6. The AAA is currently holding the matter in abeyance pending the decision of this Court on whether the parties are required to arbitrate or may litigate the issues in dispute;

7. To this point, the AAA has appointed one arbitrator but it has not ruled on the Plaintiff's motions to appoint additional arbitrators or the Plaintiff's motion to file an amended counterclaim;

8. The parties have not exchanged exhibits or witness lists nor has any evidence been taken in the arbitration;

BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSION OF LAW:

1. This Court has jurisdiction over the parties and the subject matter of this order;

2. The Plaintiff's limited participation in the arbitration proceedings did not constitute a waiver of his right to challenge the enforceability of the arbitration clause;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Doctor's Associates' motions to dismiss or to stay these proceedings on the grounds that Plaintiff has waived his right to litigate the issues that are the subject of this action by participation in arbitration are denied.

This the 3rd day of May, 1994.

/s/ John Mull Gardner
Superior Court Judge Presiding

Appendix C

[Filed May 18, 1994]

NORTH CAROLINA GASTON COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 93-CvS-1324

MICHAEL JOHNSON,
Plaintiff,
vs.
DOCTORS ASSOCIATES, INC., a Florida Corporation (f/k/a DOCTORS ASSOCIATES, INC., a Connecticut Corporation); FREDERICK DELUCA, an individual; PETER BUCK, an individual; FRANCHISE WORLD HEADQUARTERS, INC., a Connecticut Corporation; PETER SLOMIANYJ, an individual; NORTH CAROLINA SUBWAY GROUP, INC., a North Carolina Corporation; DOUGLAS BENTELLE, an individual; SHEILA HALLETT, an individual; SANTO RHODES, an individual; MICHAEL ARMELLINO, an individual; and NANCY TIMMONS, an individual;
Defendants.

AMENDED ORDER

Pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure, the May 3, 1994 Order entered in the captioned matter is hereby amended as follows:

1. Paragraph 5 of the Findings of Fact (beginning on page 1 of the Order) is stricken and is replaced with the following:

5. The Defendants Doctors Associates, Inc., Frederick Deluca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj and North Carolina Subway Group, Inc., have filed Motions to Dismiss for failure to state a claim and, in the alternative, Motions to Stay the Proceedings pending completion of arbitration proceedings;

2. Paragraph 7 of the Findings of Fact (on page 2 of the Order) is stricken and is replaced with the following:

7. After the hearing, the Court ordered the parties to file supplemental briefs and affidavits on the issue of whether Plaintiff waived his right to litigate by participating in arbitration;

3. The final paragraph of the Order is stricken and is replaced with the following:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motions brought by all moving Defendants -- Doctors Associates, Inc., Frederick Deluca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj and North Carolina Subway Group, Inc., -- to dismiss or to stay these proceedings on the grounds that Plaintiff has waived his right to litigate the issues that are the subject of this action by participation in the arbitration are denied.

4. The May 3, 1994 Order shall remain the same in all other respects.

This the 17 day of May, 1994.

/s/ John Mull Gardner
Superior Court Judge Presiding

Appendix D

[Filed May 18, 1994]

NORTH CAROLINA GASTON COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 93-CvS-1324

MICHAEL JOHNSON,
Plaintiff,

vs.

DOCTORS ASSOCIATES, INC., a Florida Corporation (f/k/a DOCTORS ASSOCIATES, INC., a Connecticut Corporation); FREDERICK DELUCA, an individual; PETER BUCK, an individual; FRANCHISE WORLD HEADQUARTERS, INC., a Connecticut Corporation; PETER SLOMIANYJ, an individual; NORTH CAROLINA SUBWAY GROUP, INC., a North Carolina Corporation; DOUGLAS BENTELLE, an individual; SHEILA HALLETT, an individual; SANTO RHODES, an individual; MICHAEL ARMELLINO, an individual; and NANCY TIMMONS, an individual;
Defendants.

ORDER

THIS MATTER coming on to be heard and being heard before the undersigned Superior Court Judge presiding at the February 28, 1994, Gaston County Civil Term of Court upon Motions to Dismiss for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure; such

Motions being brought by defendants Doctors Associates, Inc., Frederick Deluca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj, and North Carolina Subway Group, Inc., by their respective counsel; and it appearing to the Court after arguments by counsel for all parties involved that the Complaint does state a claim;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the moving Defendants' Motions to Dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure be and hereby are denied.

This the 17 day of May, 1994.

/s/ John Mull Gardner
Superior Court Judge Presiding

Appendix E

[Filed Sept. 29, 1994]

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC.	:	
-vs-	:	Civil No. 3:94CV00349 (PCD)
EMILY DISTAJO, ET AL.	:	

RULING ON PENDING MOTIONS

Plaintiff filed a petition to compel arbitration pursuant to the Federal Arbitration Act (FAA) 9 U.S.C. § 4, and subsequently an application for a Temporary Restraining Order and a Preliminary Injunction. Defendants have filed various motions to dismiss, to transfer, and for a hearing on the matter.

BACKGROUND

Plaintiff Doctor's Associates, Inc. (DAI) is the national franchisor of "Subway" sandwich shops, and is a Florida corporation. DAI entered into written franchise agreements with defendants, permitting them to operate a Subway restaurant. The agreements contain an arbitration clause (paragraph 10c) which reads as follows:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out or relating to this contract is a condition precedent to the commencement of legal

> action by either party. The cost of such a proceeding will be borne equally by the parties.

Defendants have filed suit against plaintiff, affiliated individuals and entities in various state courts. Plaintiff demanded arbitration of defendants' claims by the American Arbitration Association in accordance with the arbitration clause. Defendants have refused to arbitrate, and therefore plaintiff petitions here for an order directing defendants to arbitrate. Plaintiff moved for a temporary restraining order and for a preliminary injunction to stay the state court proceedings until this court could rule on the petitions to compel arbitration. On September 13, 1994 a hearing was held as to whether a preliminary injunction should enter. The temporary restraining order has expired.

DISCUSSION

1) *Motions for a Hearing*

Plaintiff's motions for a hearing on the petition to compel arbitration and on the motions to dismiss are denied.

2) *Motions to Dismiss*

A motion to dismiss under Rule 12(b)(6) must be decided solely on the facts alleged. *Goldman v. Belden*, 754 F.2d 1059, 1065–66 (2d Cir. 1985). Such a motion should be granted only where no set of facts consistent with the allegations could be proven entitling plaintiffs to relief. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). The issue is not whether plaintiffs will prevail, but whether they should be afforded the opportunity to offer evidence to prove their claims. *Id.*

A) *Local Rule 9*

The motions to dismiss filed in 3:94cv00370 *Doctor's Associates v. Smith* (doc. #5) and 3:94cv00369 *Doctor's Associates v. Gillon* (doc. #7) are denied for failure to file an accompanying memorandum of law as required by Local Rule 9.

B) *Subject Matter Jurisdiction*

Several of the defendants claim that this court does not have jurisdiction over the subject matter of the action because there is not complete diversity, as certain development agents of DAI doing business in the same states that defendants reside must be joined as plaintiffs in the various actions.[1] However, they are not parties to the contract that is at issue in the instant action. "Fed.R. Civ.P. 19 does not require the joinder of parties merely because they played some part in the underlying events of a dispute, but only if such parties are necessary in order to grant complete relief or if they would be prejudiced by not being joined." *Argo Partners, Inc. v. Littlefield, Adams & Co.*, 1994 WL 320616 (S.D.N.Y.). "Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration

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[1] Defendants in 3:94cv00515 *Doctor's Associates v. Youmaran*, 3:94cv00803 *Doctor's Associates v. Brenes*, 3:94cv00514 *Doctor's Associates v. Guerro*, 3:94cv00516 *Doctor's Associates v. Shino*, 3:94cv00517 *Doctor's Associates v. Loenneke*, 3:94cv00349 *Doctor's Associates v. Distajo*, 3:94cv01457 *Doctor's Associates v. Papaleo* and 3:94cv01456 *Doctor's Associates v. Rothmund* are residents of Illinois. They allege that Phil Mesi and Subway Development of Chicagoland, Inc., both development agents of DAI and residents of Illinois, are indispensable parties under Fed.R.Civ.P. 19(b). Defendants in 3:94cv00998 *Doctor's Associates v. Kane* are residents of Massachusetts. They allege that Michael and Jane Eslinger and Jams, Inc., development agents of DAI and residents of Massachusetts, are indispensable parties. Defendant in 3:94cv00803 *Doctor's Associates v. Johnson* is a resident of North Carolina. He alleges that Peter Slomianyj and North Carolina Subway Group, development agents of DAI and residents of North Carolina, are indispensable parties. Defendant in 3:94cv1108 *Doctor's Associates v. Giannini* is a resident of Pennsylvania. He alleges that J.B. Jung and Subway Development Corporation of Philadelphia, development agents of DAI and residents of Pennsylvania are indispensable parties. Defendants in *Doctor's Associates v. McCrary*, *Doctor's Associates v. Gillon*, *Doctor's Associates v. Smith*, *Doctor's Associates v. Riise*, and *Doctor's Associates v. Benton* are residents of Alabama. They allege that Bernardo Frausto and Subway Development of Northern Alabama, development agents for DAI and residents of Alabama are indispensable parties.

agreement." *Moses H.Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20 (1983). *See also Steinberg & Lyman v. Takacs*, 774 F. Supp. 885 (S.D.N.Y. 1991) (parties to an arbitration agreement must arbitrate even though there are other defendants to the action). There would be no prejudice to the various development agents by not joining them, as they are not parties to the agreement in question and the underlying litigation would proceed as to those parties even if the litigation as to Doctor's Associates and the defendants in this action was stayed. This action to enforce an agreement by the defendants to arbitrate does not require joinder of the additional parties.

The motions to dismiss in 3:94cv00349 *Doctor's Associates v. Distajo* (doc. #s 31, 33, 35, 37, 39 and 46) are denied in their entirety, as they relate solely to this issue of subject matter jurisdiction.

C) *Personal Jurisdiction/Venue*

Defendants contend that this court lacks personal jurisdiction over them and that venue is not proper.[2] These arguments are without merit. In accordance with the arbitration agreement, defendants "subjected [themselves] in advance, to the jurisdiction of the court within whose territorial jurisdiction the arbitration proceedings are to be had . . . ." *Hatzlachh Supply Inc. v. Moishe's Electronics, Inc.*, 828 F. Supp. 178, 185 (S.D.N.Y. 1993) (vacated on other grounds, *Hatzlachh Supply, Inc. v. Moishe's Electronics, Inc.*, 848 F. Supp. 25

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[2] Defendants assert this argument in the following cases:

3:94cv00515 *Doctor's Associates v. Youmaran*
3:94cv00998 *Doctor's Associates v. Kane*
3:94cv00514 *Doctor's Associates v. Guerro*
3:94cv00803 *Doctor's Associates v. Brenes*
3:94cv01108 *Doctor's Associates v. Gianni*
3:94cv00516 *Doctor's Associates v. Shino*
3:94cv00517 *Doctor's Associates v. Loenneke*
3:94cv00349 *Doctor's Associates v. Distajo*
3:94cv00803 *Doctor's Associates v. Johnson*

(S.D.N.Y. 1994)); *Farr & Co. v. Cia. Intercontinental De Navegacion De Cuba*, 243 F.2d 342, 346 (2d Cir. 1957). The arbitration agreement also includes a choice-of-forum clause, stating that the parties are to settle any disputes in Connecticut. Such advance consent waives any objection to personal jurisdiction and venue.

D) *Abstention*

Defendants contend, in a conclusory manner, that this court should decline to exercise jurisdiction over the matter under the doctrine of abstention, citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-17 (1976).[3] Federal courts generally do not dismiss proceedings merely because the same matter is being litigated in state court. Only exceptional circumstances will compel a federal court to relinquish jurisdiction due to parallel proceedings in state court. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13-14 (1983). Defendants claim that proceedings in over nine cases in state courts constitute compelling circumstances. There is nothing remarkable about parallel state litigation. Although it is not entirely clear how extraordinary the circumstances must be in order for the court to decline to exercise its jurisdiction in this context, it is clear that parallel proceedings alone is not sufficient. *See Id.*; Erwin Chemreinsky, *Federal Jurisdiction* at 669 (4th ed. 1989) (listing cases in which courts abstained due to varying circumstances). Defendants have not enumerated exceptional circumstances that warrant dismissal in deference to the state court litigation.

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[3] The following defendants assert this argument:

3:94cv00515 *Doctor's Associates v. Youmaran* (doc. #4)
3:94cv00803 *Doctor's Associates v. Brenes* (doc. #4)
3:94cv00514 *Doctor's Associates v. Guerro* (doc. #4)
3:94cv00516 *Doctor's Associates v. Shino* (doc. #6)
3:94cv00517 *Doctor's Associates v. Loenneke* (doc. #5)
3:94cv00349 *Doctor's Associates v. Distajo* (doc. #18)
3:94cv00998 *Doctor's Associates v. Kane* (doc. #3)
3:94cv01108 *Doctor's Associates v. Gianni* (doc. #4)

E) *Res Judicata and Collateral Estoppel*

Defendant in *Doctor's Associates v. Johnson* alleges that res judicata or collateral estoppel precludes jurisdiction here over the matter because the North Carolina trial court in which a complaint was filed declined to stay the lawsuit. These orders are on appeal, and therefore they do not constitute a final judgment on the merits. Therefore res judicata does not apply. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980). Collateral estoppel applies only to issues decided finally in another forum. *Jim Beam Brands Co. v. Crawford, Ltd.*, 937 F.2d 729, 734 (2d Cir. 1991). Even if these orders were to be considered final, a denial of a motion to stay does not preclude a petition to compel arbitration pursuant to § 4 of the FAA. *See In re Pahlberg Petition*, 131 F.2d 968, 969 (2d Cir. 19).

Defendants in *Doctor's Associates v. McCrary* allege that an Alabama state court has determined the arbitration clause to be void and unenforceable and therefore these issues may not be relitigated in this forum. There is currently pending a motion to reconsider the judgment in the state court. Consequently, there is not a final judgment, as discussed above, and the doctrines of res judicata and collateral estoppel do not apply.

4) *Motion for Preliminary Injunction*

Plaintiffs move for a preliminary injunction to enjoin defendants from moving forward with their respective cases in state court. Defendants claim that this court cannot grant the relief requested under the provisions of 28 U.S.C. § 2283 (the "Anti-Injunction Act").

The Anti-Injunction Act was promulgated to balance the tensions between state and federal courts in a dual system, eliminating inevitable friction that may occur when both state and federal courts entertain proceedings. As the Supreme Court has noted, state proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state

appellate courts and ultimately this Court." *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 287 (1970).

Injunctions can issue against state proceedings in certain limited situations, "namely, when expressly authorized by statute, necessary in aid of the court's jurisdiction, or necessary to protect or effectuate the court's judgment." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). The exceptions are narrow and "'not [to] be enlarged by loose statutory construction.'" *Id.* (quoting *Atlantic* 398 U.S. at 146). As there is neither statutory authority for entry of an injunction nor a judgment which the court seeks to effectuate, the question is whether this court can enjoin the state court proceedings in aid of its jurisdiction.

In the present action, the state and federal court have concurrent jurisdiction and consequently neither court is "free to prevent either party from simultaneously pursuing claims in both courts." *Atlantic* 398 U.S. at 295.

> Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by application of the principles of res judicata.

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977). Additionally, the Supreme Court has limited the "in aid of jurisdiction" exception only to cases in which a federal court acquires jurisdiction over real property, but has not extended it to proceedings involving *in personam* jurisdiction. *Atlantic* 398 U.S. at 295-96. As the state court proceedings do not impair this court's jurisdiction to proceed, and there is no dispute as to real property, an injunction is not appropriate.

Exceptions to the Anti-Injunction Act recognized in the Second Circuit also do not apply to the present situation. The Act has been found not to apply when state court proceedings have not been instituted. *Standard Microsystems v. Texas*

Instruments, 916 F.2d 58, 61 (2d Cir. 1990). However, each of the consolidated cases have pending litigation in a state court, and the act bars "an injunction to stay *proceedings* in a State court." 28 U.S.C. § 2283 (emphasis added). The Second Circuit has cast doubt as to the validity of another exception formulated in the Seventh Circuit in *Barancik v. Investors Funding corp.*, 489 F.2d 933 (7th Cir. 1973), which allowed an injunction if the state court proceedings were instituted after a motion was filed to enjoin it, but before the court ruled on it. *See Standard Microsystems*, 916 F.2d at 61. The facts here do not support such an argument as the state court litigation was commenced prior to plaintiff's application for a preliminary injunction.

The motion for a preliminary injunction (doc # 59) is denied as the action does not fall within any of the narrow exceptions to the Anti-Injunction Act. Accordingly, defendants' motions to file responsive pleadings in state court are granted.

Conclusion

The following motions to dismiss are denied:

3:94cv00349 *Doctor's Associates v. Distajo* (doc. #s 4, 18, 31, 33, 35, 37, 39, 46, 53, 84, 86, 89)
3:94cv00369 *Doctor's Associates v. Gillon* (doc. #7)
3:94cv00370 *Doctor's Associates v. Smith* (doc. #5)
3:94cv00511 *Doctor's Associates v. Brenes* (doc. #4)
3:94cv00514 *Doctor's Associates v. Guerro* (doc. #4)
3:94cv00515 *Doctor's Associates v. Youmaran* (doc. #4)
3:94cv00516 *Doctor's Associates v. Shino* (doc. #6)
3:94cv00517 *Doctor's Associates v. Loenneke* (doc. #5)
3:94cv00803 *Doctor's Associates v. Johnson* (doc. #3)
3:94cv00948 *Doctor's Associates v. Kane* (doc. #3)
3:94cv01108 *Doctor's Associates v. Gianni* (doc. #4)
3:94cv01457 *Doctor's Associates v. Papaleo* (doc. #5)

The following motions for a hearing are denied:

3:94cv00349 *Doctor's Associates v. Distajo* (doc. # 21 & 50)
3:94cv00354 *Doctor's Associates v. McCrary* (doc. # 9)
3:94cv00369 *Doctor's Associates v. Gillon* (doc. # 9)

3:94cv00370 *Doctor's Associates v. Smith* (doc. # 8)
3:94cv00371 *Doctor's Associates v. Riise* (doc. # 10)
3:94cv00372 *Doctor's Associates v. Benton* (doc. # 8)
3:94cv00511 *Doctor's Associates v. Brenes* (doc. #8)
3:94cv00514 *Doctor's Associates v. Guerrero* (doc. #8)
3:94cv00515 *Doctor's Associates v. Youmaran* (doc. #8)
3:94cv00516 *Doctor's Associates v. Shino* (doc. #7)
3:94cv00517 *Doctor's Associates v. Loenneke* (doc. #8)

The following motions to file documents in pending state proceedings are granted: *Doctor's Associates v. Distajo* 3:94cv00349 (doc. #s 72, 73, 74, 77, 78, 79, 80). The motion for leave to file a supplemental memorandum of law in support of the motion to dismiss for lack of venue 3:94cv00511 *Doctor's Associates v. Brenes* (doc. #7) is granted, and was considered. The motion to transfer venue, *Doctor's Associates v. Distajo* 3:94cv00349 (#8), is denied. The motion for a preliminary injunction *Doctor's Associates v. Distajo* 3:94cv00349 (#59) is denied.

Any responsive pleadings to the petitions to compel arbitration shall be filed on or before October 14, 1994. The petitions shall be decided on the record as of that date.

SO ORDERED.

Dated at New Haven, Connecticut, this 29th day of September, 1994.

/s/ Peter C. Dorsey
United States District Judge